

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA

15 CR 637(KAM)

4 versus

5 MARTIN SHKRELI and EVAN GREEBEL,

U.S. Courthouse  
225 Cadman Plaza East  
Brooklyn, NY 11201

6 Defendants.

November 22nd, 2016

1:00 p. m.

7  
8 TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION TO COMPEL

9 BEFORE THE HONORABLE KIYO MATSUMOTO

10 UNITED STATES DISTRICT JUDGE

11 APPEARANCES

12  
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LISA SCHMID, CCR, RMR

1           COURTROOM DEPUTY: This is a Hearing on a Motion to  
2 Compel in 15 CR 637, USA versus Martin Shkreli and Evan  
3 Greebel.

4           Will the government's attorneys state your  
5 appearances, please?

6           MR. PAES: Winston Paes, Jacquelyn Kasulis and  
7 Alixandra Smith for the government. Good afternoon, Your  
8 Honor.

9           THE COURT: Good afternoon.

10          COURTROOM DEPUTY: Those on behalf of Mr. Shkreli?

11          MR. BRAFMAN: Benjamin Brafman and Andrea Zellan.  
12 Good afternoon, Your Honor.

13          THE COURT: Good afternoon.

14          COURTROOM DEPUTY: Those on behalf of Mr. Greebel?

15          MR. BRODSKY: Yes, Your Honor. Reed Brodsky,  
16 Winston Chan and Lisa Rubin on behalf of Evan Greebel, who is  
17 also here with us.

18          THE COURT: Good afternoon.

19          And I think we had counsel for Katten that was asked  
20 to be here. Do you want to come up to the table and sit  
21 somewhere, wherever you're comfortable, and state your  
22 appearances, please?

23          MR. VERDE: Michael Verde and Elizabeth Langdale for  
24 Katten, Muchin, Rosenman.

25          THE COURT: Verde and Langdale?

1 MR. VERDE: Yes.

2 THE COURT: All right. Thank you.

3 And who do we have from the Cooley Firm on behalf of  
4 Retrophin? Come on up, sir. Mr. Shapiro?

5 MR. SHAPIRO: Hi.

6 THE COURT: Welcome. You can sit over there.  
7 There's plenty of room over there. No one is taking sides.

8 All right. And will Mr. Shapiro be speaking on  
9 behalf of Retrophin?

10 MR. SHAPIRO: Yes, Your Honor.

11 THE COURT: All right. Thank you.

12 Mr. Brafman you're standing. What do you want to  
13 say?

14 MR. BRAFMAN: Yes, Your Honor. I just wanted, for  
15 the convenience of the Court, just to set the table, if I may,  
16 Your Honor, to hopefully expedite matters.

17 THE COURT: I would appreciate it.

18 MR. BRAFMAN: Thank you. And I also just want to  
19 note that while Mr. Agnifilo spearheaded the project and got  
20 all the parties together, and I was supposed to be on a plane  
21 somewhere else. Unfortunately, his daughter was in a very  
22 serious car accident and he's upstate in Albany with her at  
23 the hospital.

24 THE COURT: I'm sorry.

25 MR. BRAFMAN: I arranged to take a later flight

1 because I thought it would be too difficult to reschedule  
2 this, given the number of lawyers involved and the convenience  
3 of the Court and all parties. We are prepared to proceed.

4 THE COURT: All right. I appreciate you being here,  
5 and please give him my regards.

6 MR. BRAFMAN: I will, Your Honor.

7 Your Honor, I think this is, as complicated as it  
8 was to arrange for the conference, I think the issues are  
9 rather simple.

10 We, on behalf of Mr. Shkreli, had subpoenaed the  
11 Katten Law Firm and asked them to produce various documents  
12 which we laid out in the subpoena -- which I'm obviously  
13 prepared to explain to the Court if it becomes necessary --  
14 and as I understand, Katten's position is they have the  
15 documents. They are prepared to turn them over. Both Mr.  
16 Shkreli, through counsel, has waived his privilege and they're  
17 his documents for the most part.

18 I understand from conversations with Mr. McGorty,  
19 Glen McGorty, who is representing Marek Biestek, who has also  
20 waived his privilege, one of the founders of MSMB and --

21 THE COURT: He waives it only with regard to  
22 Mr. Shkreli?

23 MR. BRAFMAN: I'm sorry?

24 THE COURT: He has waived it only with regard to  
25 Mr. Shkreli?

1 MR. BRAFMAN: He has waived it with regard to any  
2 documents that pertain to Mr. Shkreli. That's correct, Your  
3 Honor.

4 THE COURT: So is he maintaining his privilege?

5 MR. BRAFMAN: No. He's waiving his privilege with  
6 respect to any documents that we deem appropriate and that  
7 we've outlined in the subpoena.

8 THE COURT: So that takes care of MSMB Capital and  
9 MSMB Healthcare?

10 MR. BRAFMAN: Correct, Your Honor. And as I  
11 understand it, the only issue to resolve is counsel for  
12 Retrophin has taken the position that they do not waive on  
13 behalf of Retrophin, and we take the position that by  
14 complying with a document production and making a document  
15 production to the United States Attorney's office, they have  
16 essentially waived that privilege on these documents.

17 And they have apparently selected those documents  
18 which they felt the government should have and kept and  
19 maintained a great many documents which, upon information and  
20 belief as an officer of the court, I tell you that I have a  
21 good faith basis to suggest that many of the documents that  
22 they maintain are not only relevant to the defendant, Martin  
23 Shkreli, and also to the advice of counsel defense that I  
24 think he is going to be entitled to introduce at trial, but  
25 they are relevant to many of the documents that they have

1 already produced, and what they have done is produce documents  
2 that relate back and yet the documents in between have not  
3 been produced.

4           So, Mr. Shkreli, I believe has the right to have  
5 those documents and I think the only thing that is standing in  
6 the way of Katten producing them is they do not want to be  
7 making the decision as to whose privilege it is. Otherwise,  
8 they would have turned them over a long time ago. I think  
9 that sets the table as to where we are.

10           THE COURT: All right. I think that -- thanks to  
11 Cooley's recent letter dated November 18th, they have  
12 indicated a couple things and that I think give some hope that  
13 there could be a resolution.

14           One is that they have offered or reached out to  
15 Mr. Shkreli's counsel to discuss the expansion of the  
16 Retrophin or Retrophin waiver. Has any progress been made on  
17 that front?

18           MR. SHAPIRO: We haven't heard anything in response  
19 on that point.

20           THE COURT: All right. Well, I don't know what the  
21 expanded bounds of the waiver would be, but it might obviate  
22 some of the litigation. The problem I have is, A, I haven't  
23 seen the documents; B, I haven't gotten as clear an idea from  
24 Retrophin what particular documents it asserts a privilege  
25 over.

1           There are a couple of things that I have in my mind.  
2       One is that there has been a production to the U. S.  
3       Attorney's office. Those documents have been provided, as I  
4       understand it, to defense counsel already; two, there's a  
5       claim I think between Katten and the Cooley Firm that 90  
6       percent of the documents may not even relate to the issues in  
7       the indictment. So we're talking about a fairly small  
8       universe of documents.

9           And on that point, I would ask Mr. Brafman whether  
10      he would consider narrowing the scope of his request because  
11      as we know, the subpoena seeks all communications, all emails,  
12      all documents regarding Mr. Shkreli, and I would think that he  
13      might want to focus on documents that pertain to issues in the  
14      indictment rather than this broad universe -- because  
15      otherwise, we're talking about a lot more documents, and I  
16      don't really see how it could be relevant to claims or the  
17      assertions in the indictment or to the defense if they have  
18      nothing whatsoever to do would those charges.

19           MR. BRAFMAN: Your Honor, it's almost impossible for  
20      us to do that unless there was an index provided by Retrophin  
21      as to what documents they maintained and --

22           THE COURT: Well, they'll have to do that because if  
23      they maintain a privilege, I'm going to order that they give a  
24      privilege log, so everyone will have an idea what documents  
25      are at stake.



1           And one way of doing that is for Retrophin to go to  
2 the Katten Firm and review documents and decide what documents  
3 it continues to maintain an assertion of privilege over --  
4 bearing in mind that, one, they have already produced  
5 documents to the government; two, Judge Weinstein has already  
6 found that certain documents are subject to the Crime-Fraud  
7 Exception, so the waiver does not apply; three, Retrophin has  
8 commenced a Southern District action against Mr. Shkreli,  
9 alleging acts that are similar to, or overlapping in some  
10 sense with the charges in this case.

11           And we know that courts may not allow the  
12 attorney/client privilege to be used as a sword and a shield.  
13 So to the extent they may be relying upon documents to prove  
14 fraud claims against Mr. Shkreli, they are in fact waiving any  
15 privilege over those documents.

16           I understand that that case is stayed simply because  
17 this case is going forward. I think that, you know, Retrophin  
18 has to take a hard look and decide whether they are, in fact,  
19 attempting to use the privilege as a sword and a shield, a  
20 sword against Mr. Shkreli in the fraud case and a shield here,  
21 to protect against his right to get access to those documents.

22           MR. SHAPIRO: Your Honor, one suggestion that might  
23 facilitate that, since we're addressing the subpoena that was  
24 addressed to Katten, if Katten could in the first instance  
25 enumerate the matters in which they provided legal advice to

1 Retrophin, and Mr. Brafman and I might be able to decide that  
2 with respect to any number of those matters that they're too  
3 far afield from the transactions at issue in this case. And  
4 so we wouldn't need to do a document-by-document review of the  
5 Katten documents that fall within those matters. But with  
6 respect to any matters where Mr. Brafman believes that the  
7 matter could be relevant to this case, then we will do  
8 whatever we're asked and we'll deal with the Katten documents  
9 in those categories and make a determination about whether  
10 they're within the scope of the company's waiver or subject to  
11 the principle that you just articulated with respect to our  
12 civil action.

13 MR. BRAFMAN: Your Honor, I'm happy to do whatever  
14 Your Honor feels will be productive, but I just want to say  
15 several things so that the Court recognizes that I'm not  
16 certain we are on a level playing field when it comes to the  
17 Retrophin agenda, if you will -- and this is not speaking  
18 poorly of Mr. Shapiro. But I think Your Honor needs to know  
19 the following very simple facts.

20 With the employment contract between Mr. Shkreli and  
21 Retrophin, the only way he gets the substantial benefits that  
22 are still owed to him is if he is convicted. Having been  
23 charged, they stayed all of these benefits and owe him a lot  
24 of money if he ends up getting convicted.

25 Among the documents that they provided to the

1 government -- and they provided them under what they describe  
2 as a limited waiver in a letter that they wrote -- is our  
3 documents that are, in my opinion, incomplete and unfair in  
4 the way they characterize some of the transactions involving  
5 Mr. Shkreli.

6 In the Katten Firm where Mr. Greebel was a partner  
7 during almost all of the period covered by the indictment,  
8 this was Mr. Greebel's biggest client. Katten billed more  
9 than five million dollars of legal services for the  
10 representation of Mr. Shkreli and part MSMB and also Retrophin  
11 during the relevant time period.

12 When you're doing the reliance on counsel defense  
13 that we already have the good faith basis to articulate, it's  
14 absolutely clear just from the handful of documents we got  
15 from the government that on many occasions, Mr. Shkreli sought  
16 guidance from Mr. Greebel and Mr. Greebel gave him guidance.

17 Now, it's impossible for us to say what is and what  
18 is not relevant on the issue of reliance of counsel because  
19 unless we do document-by-document -- which will take months  
20 because we're talking about hundreds of thousands of pieces of  
21 paper -- and we're not doing a severance motion by agreement  
22 among counsel because it would make us do it twice until after  
23 we see those documents -- but I think under Rule 502 of the  
24 Federal Rules of Evidence, I think Retrophin has waived any  
25 further claim on the privilege by the partial production.

1           And in pertinent part, I want to represent to the  
2 Court what Your Honor said is very on point. They have sued  
3 Mr. Shkreli. And once you sue someone, as Your Honor pointed  
4 out, even if it's a stayed proceeding, you can't just say I'm  
5 suing you, but I'm not giving you the documents because I'm  
6 maintaining privilege. That's A.

7           And under the Rules of Evidence as I read them --  
8 and I just want to in pertinent part make this part of the  
9 record, 502(a) provides, "Disclosure made in a federal  
10 proceeding for the federal officer or agency, Scope of Waiver:  
11 When the disclosure is made in a federal proceeding or to a  
12 federal officer or agency and waives the attorney/client  
13 privilege or work product protection, the waiver extends to an  
14 undisclosed communication or information in a federal  
15 proceeding only if the waiver is intentional" -- and here, it  
16 was. They intentionally waived it -- "two, the disclosed and  
17 disclosed communications or information concerned the same  
18 subject matter" -- and we maintain that it does and I'll  
19 explain in a minute -- "and three, they ought to, in fairness,  
20 be considered together." I think it refers also to Rule 106  
21 of the Doctrine of Completeness.

22           You can't give me an email in July that relates back  
23 to advice given six months earlier and then not give me the  
24 chain that leads up to the ultimate email. And the reason it  
25 relates to the same subject matter is the government and

1 Retrophin in its lawsuit have maintained from the beginning  
2 that Mr. Shkreli's companies, whether it be MSMB or Retrophin,  
3 was in effect a Ponzi scheme from the beginning to end.

4 And I think during the period of Katten's  
5 representation, they provided guidance to Mr. Shkreli. They  
6 billed five hundred thousand and change for work done for MSMB  
7 and they billed more than four and-a-half million dollars for  
8 work done on behalf of Mr. Shkreli and Retrophin. And you  
9 can't separate the two and say we were doing it for Shkreli on  
10 day one and for Retrophin on day two.

11 Retrophin is the -- if you will -- the protagonist  
12 in this case. They went to the U. S. Attorney's office.  
13 That's the catalyst for the charges against Mr. Shkreli. I  
14 think they have a bias. They have a vested interest in the  
15 outcome of these proceedings, and I think he's a defendant in  
16 a criminal case who has, A, waived the privilege. They're his  
17 documents. Mr. Biestek has waived the privilege. They're his  
18 documents. And for Retrophin to say, we're going to give the  
19 government the documents we think help them and then stand on  
20 ceremony when it comes to the balance of the documents --

21 I think they're all potentially relevant because the  
22 universe of work done on behalf of Mr. Shkreli is -- goes to  
23 the heart of the reliance on counsel defense. You can't bill  
24 someone five million dollars for doing legal work and then  
25 say, by the way, I didn't give you advice on that single day

1 so therefore, you're guilty. So I don't know. I don't know  
2 how to do this without spending months trying to comb through  
3 boxes of material.

4 THE COURT: Well, Cooley, maintains that there  
5 aren't that many documents. There are 2000 email chains which  
6 could probably be reviewed in a couple of days. And there are  
7 8,000 emails, but they're part of an email chain, many of  
8 these, right?

9 MR. BRAFMAN: I think that understates substantially  
10 the amount. I think if you check with Katten, the numbers are  
11 substantially greater.

12 THE COURT: Well, they dispute what Katten says and  
13 I guess Katten has the documents, so they probably are the  
14 most reliable. But it seems that Retrophin is only concerned  
15 about the universe of 2000 email chains, right?

16 MR. SHAPIRO: Those are the emails we were  
17 describing, that is, the emails between Mr. Shkreli and  
18 Mr. Greebel between December 2012 --

19 THE COURT: Certain dates?

20 MR. SHAPIRO: -- and Mr. Shkreli's departure from  
21 Retrophin in October of 2014. There's a prior period, but we  
22 were using that 21 month period as a reference point to say  
23 that in a five or six month period in '11 and '12, where  
24 Mr. Verde thought there could be overlap, that we didn't see  
25 how it's possible that there were tens of thousands of emails.

1 MR. BRAFMAN: Your Honor, they are closeting this as  
2 communications between Mr. Shkreli and Mr. Greebel. There are  
3 communications with other Retrophin people who are critical  
4 government witnesses in this case, who I think are the  
5 catalysts for the criminal charges, who I think their email  
6 chain will show an extraordinary bias and very, very difficult  
7 relationship with Martin Shkreli that I think are going to  
8 impact severely on their credibility when and if this case  
9 proceeds to trial.

10 And it is very important for Mr. Shkreli that we not  
11 adjourn the trial date for any reason because it's hard to  
12 live under the cloud of an indictment, and we have been  
13 working feverishly not to have to adjourn that case.

14 A critical issue Your Honor will have to decide  
15 before the trial -- including this issue, obviously -- is  
16 whether or not there is one trial or two trials. And I think  
17 if we convince Your Honor that there is a very serious  
18 reliance of counsel defense, it becomes untenable for  
19 Mr. Shkreli and Mr. Greebel to be tried together at the same  
20 time -- at least that's going to be our position. And I don't  
21 see how the Cooley Firm on behalf of Retrophin can essentially  
22 start a criminal proceeding and then throw a monkey wrench  
23 into the ability of the principal defendant to defend himself.

24 THE COURT: Well, I understand, and I understand  
25 that point. I guess there's a couple of --

1 Did you want to be heard, Mr. Shapiro?

2 MR. SHAPIRO: We didn't start the criminal  
3 proceeding. We were responding to a subpoena that we had  
4 received from the government. That's number one.

5 And number two, we're not proposing to withhold  
6 documents on the same subject matter where we waive the  
7 privilege or where there would be additional topics where  
8 Mr. Brafman asked us to consider waiving the privilege, as  
9 well. What we're suggesting is with respect to a wide range  
10 of topics that have no relevance to this case, we're seeking  
11 to maintain privilege.

12 THE COURT: All right. But you haven't identified  
13 what those documents are. I don't know who they were -- I  
14 don't know what the subject matter was. I don't know who was  
15 on the email chain. And Katten has the documents. It appears  
16 that there are documents where Katten cannot remember or can't  
17 determine whether they were doing work for Retrophin or MSMB  
18 or Mr. Shkreli or both, just from the face of the email.

19 And do I understand you correctly, Mister --

20 MR. VERDE: Verde.

21 THE COURT: All right. You're Mr. Verde. Yes?

22 MR. VERDE: Yes, Your Honor. That's correct.

23 There's a couple of different time periods here. It may help  
24 if I give you some idea of the magnitude.

25 THE COURT: Well, what is wrong with the idea of



1 having Retrophin or Mr. Shkreli look at those documents and  
2 tell you, if you can't tell from the face of it?

3 I mean, it would seem to me that Katten would have  
4 retainer agreements that they would bill a particular day or  
5 set of time within a day to a particular client, and you would  
6 be able to tell by looking at your time records and the work  
7 that you did bill and who you billed as to whose work you were  
8 doing.

9 And then I think the next layer that has to be  
10 examined is whether you were providing legal advice or  
11 business advice. I don't know what it was. But as we know,  
12 the privilege only applies to legal advice, not business  
13 advice.

14 I also don't know whether Mr. Greebel was the only  
15 attorney at Katten who gave advice to Retrophin and  
16 Mr. Greebel -- I'm sorry, Mr. Shkreli -- or whether there were  
17 other attorneys there who are still at Katten who could assist  
18 in that or who could recollect.

19 Maybe, you know, the concern is if Retrophin goes in  
20 there, into your firm and looks at documents that may pertain  
21 only to MSMB, they may be breaching a privilege, which in  
22 fact, has been waived by MSMB.

23 But I'm trying to think of a way forward.

24 MR. VERDE: Well, what we had suggested in our meet  
25 and confer that there was a period of time where we were

1 representing only MSMB --

2 THE COURT: Right.

3 MR. VERDE: -- prior to representing Retrophin. But  
4 Retrophin, LLC, a precursor to Retrophin, Inc., did exist at  
5 the time. So we said, well, can we at least produce those  
6 documents to Mr. Shkreli's counsel? Retrophin responded no  
7 because Retrophin, Inc. existed at that time. Some of those  
8 documents might refer to Retrophin, Inc.

9 THE COURT: But they have to identify them and  
10 assert a privilege and do a privilege log and tell us what the  
11 basis is for that privilege. We can't just throw this broad  
12 net, right? And leave you holding the documents, so to speak.  
13 So you need to do some work. You need to go there and look  
14 through the documents and figure out what's privileged and  
15 what's not, and then maybe I'll look at them in camera and  
16 decide whether they are.

17 MR. SHAPIRO: We'll do more than that. There's a  
18 period from early 2011 where Katten in its good faith review  
19 of the documents is confident that they only relate to MSMB,  
20 then we will take their representation on that point and they  
21 can produce them as unrelated to their representation of  
22 Retrophin, LLC.

23 What we're objecting to is making that determination  
24 in a mechanical way that didn't involve the use of a lawyer's  
25 judgment and merely involves the use of search terms.

1 But Mr. Verde can review documents from a period of  
2 time before they ever represented Retrophin, LLC, to confirm  
3 that there's no possibility that they were representing  
4 Retrophin, then we're comfortable with those documents being  
5 produced to Mr. Shkreli.

6 MR. VERDE: We had offered to produce -- to do a  
7 search of any documents that had the word "Retrophin" in it  
8 anywhere, and put that to one side and just produce those  
9 documents, made no reference to Retrophin anywhere. We were  
10 told that was not correct because this has been continual.  
11 That part of the plan for sometime was to convert MSMB, in  
12 effect, to Retrophin and take those investors and move them to  
13 shareholders for Retrophin.

14 So this idea that we're going to review thousands of  
15 emails and make judgment calls as to whether they could  
16 possibly -- as you heard, very broad -- if there is anyway  
17 that they could impact upon Retrophin or be considered  
18 Retrophin documents, it's impossible for us to make those  
19 decisions. We're choosing between two former clients, and  
20 we're going to be calling balls and strikes in the hundreds of  
21 thousands of emails, and somebody is not going to be happy  
22 about that.

23 THE COURT: Well, are there any other attorneys at  
24 Katten who worked on these matters with Mr. Greebel and his  
25 firm --

1 MR. BRAFMAN: Yes, Your Honor.

2 THE COURT: -- who could assist with this process?

3 MR. VERDE: It's not a matter of the manpower, Your  
4 Honor. It's a matter of the fact that if you look at a lot of  
5 these documents we're talking about, in the emails, they do  
6 cover multiple matters. There is a history there that you  
7 need to understand. These are not even calls.

8 And so what we were suggesting is to put the burden  
9 on us of making judgment calls that we really should not be  
10 making, that we would -- if there was any kind of mechanical  
11 rules, search terms, logical, if not X then Y, then Z -- we'll  
12 do anything. What we want to avoid is making judgment calls.

13 THE COURT: So I agree and I appreciate that and I  
14 understand your position. But it seems to me that if  
15 Retrophin is taking the position that it's taking with regard  
16 to its privilege, then it needs to, you know, roll up its  
17 sleeves, go into your document files and figure out what  
18 documents they're going to assert a privilege over and  
19 determine, A, whether or not it's already been produced; B,  
20 whether or not it would be subject to the Crime-Fraud  
21 Exception; C, whether or not it is implicated by the civil  
22 claims against Mr. Shkreli. And then at the end of the day,  
23 if I have to look at them, I will, but I don't even know how  
24 many documents we're talking about, so --

25 MR. SHAPIRO: That's fine, Your Honor.

1 THE COURT: -- if Retrophin is also willing to  
2 expand the scope of its waiver and make more documents  
3 available, that would be the first step, so that nobody has  
4 to do unnecessary work.

5 MR. SHAPIRO: That's something we've offered and  
6 we're still willing to talk to Mr. Brafman about that.

7 MR. BRAFMAN: Your Honor, what you're proposing,  
8 most respectfully, and what they are offering is going to be a  
9 monumental undertaking and let me just explain, most  
10 respectfully, Your Honor.

11 For example, I have the summary of billing records  
12 for the year 2013, 2014. During that year alone, Katten  
13 billed 5,684 hours to Shkreli. It says Retrophin, but that's  
14 the umbrella under which they billed it. During that period  
15 --

16 THE COURT: What was the umbrella?

17 MR. BRAFMAN: Retrophin, Inc.

18 So that's how they have it for internal billing  
19 purposes, but we know from just looking at the documents the  
20 government produced that during that time period are a lot of  
21 Shkreli-related materials -- and we're not just looking for  
22 emails. There are billing records that we haven't gotten  
23 which detail the work done by Mr. Greebel and others on behalf  
24 of Mr. Shkreli, legal filings that they did on behalf of  
25 Mr. Shkreli and legal memoranda.

1           And Your Honor, it was from the materials we have  
2 received, you know, Evan Greebel went to Katten at various  
3 times citing his work on behalf of Shkreli and Retrophin as a  
4 basis upon which he should receive bonuses because of all of  
5 the work that they have done.

6           For Retrophin to suggest that they have any  
7 prejudice whatsoever by turning over these documents --  
8 they're not going to be -- we could take it under a protective  
9 order. Let us look at them. We will give them back if we  
10 think that has nothing to do with this case.

11           But it is humanly impossible to expect Katten to  
12 make these judgment calls because they cannot understand how  
13 they may be relevant to our defense, and I think Retrophin  
14 should not be able to do that because Retrophin has a vested  
15 interest in keeping from Mr. Shkreli that information which I  
16 believe could lead to his acquittal, because they owe him  
17 millions and millions of dollars if he is convicted.

18           So I'm not doubting Mr. Shapiro's personal good  
19 faith, but for Retrophin to take the position that, A, I can  
20 start a lawsuit; and B, I can sue Mr. Shkreli; and C, I can  
21 cooperate with the U. S. Attorney's office and dump documents  
22 to them, and then with the letter that they write to suggest  
23 that it's a limited waiver flies in the face of Rule 502.

24           And I think what the Court needs to do if we're  
25 going to keep this schedule is order Retrophin to permit

1 Katten to just give us the records. We'll look at them under  
2 a protective order. No one outside of our firm will go  
3 through them. We will then report back and say, here, here's  
4 back what we don't need. Here's what we are keeping and  
5 intend to use at the trial. And here's the theory on which we  
6 will keep it and use it for the trial and then report to Your  
7 Honor.

8           And then if they have an issue of us not being able  
9 to use that, it makes a lot more sense for them to do it that  
10 way, and then they can give it to the government at the same  
11 time and the government can look at them. This is not us  
12 trying to gain an undue advantage. We are placed in an  
13 untenable position because Retrophin has given the government  
14 selective documents.

15           THE COURT: No, I know that, sir. You have told me  
16 that three times now. I get that, respectfully.

17           But yes, Mr. Paes?

18           MR. PAES: I just want to make one point.  
19 Obviously, with respect to any documents that would be turned  
20 over, the government would also want to receive a copy. I  
21 think Mr. Brafman alluded to that.

22           MR. BRAFMAN: Yes.

23           MR. PAES: I just want to be clear that given the --  
24 at least the Shkreli waiver and MSMB waiver from what we have  
25 heard, we just want to make sure that, you know, if documents

1 go over that it's not -- I'm not saying Mr. Brafman is  
2 alluding to this -- but that Shkreli's lawyers get to decide  
3 what to keep, what to still return back as being privileged,  
4 then the government should have an equal opportunity to review  
5 those documents as well, as to whatever -- we don't have  
6 obviously, you know, a dog in this fight in terms of whose  
7 privilege it is and who is asserting it, but I just want to  
8 make sure that we don't somehow get out left out of the  
9 process of ultimately receiving the documents that are  
10 provided to defense counsel.

11 And we also have a subpoena as -- you know, as  
12 Mr. Verde knows that he served on the Katten Law Firm, and we  
13 haven't received documents in large part because of the same  
14 issues of privilege and the --

15 MR. VERDE: (Nods head affirmatively.)

16 MR. PAES: -- inability of Katten to decide where  
17 the privilege lies, and that may be because of how some of  
18 these things were billed. We understand, as was reported,  
19 they were all billed under the Retrophin umbrella, regardless  
20 of what the work was being done, and I believe Retrophin was  
21 billed and they can speak to that.

22 But there are some issues here, obviously, which is  
23 why we haven't received the documents pursuant to our subpoena  
24 to Katten, as well.

25 THE COURT: Let me ask Retrophin's counsel, who



1 currently is asserting the privilege on Retrophin? What  
2 person? Because I think that's something I ordered.

3 MR. SHAPIRO: The company, the board of directors.

4 THE COURT: But who? Who is the authorized  
5 individual that's asserting the privilege?

6 MR. SHAPIRO: At the time when the board -- when the  
7 company decided to make the limited waiver in the summer of  
8 2015, the board -- there was a board meeting and the board  
9 decided to approve the limited waiver by implication to  
10 continue to assert the privilege over everything else.

11 And we are -- we're not seeking to prejudice  
12 Mr. Shkreli in addressing this waiver. We're just objecting  
13 to a wholesale waiver of all of the work that Katten did for  
14 Retrophin over this three or four year period.

15 THE COURT: All right. Well, let me ask Katten, do  
16 you have -- who did you deal with when you -- when your firm  
17 did work for Retrophin, who was the individual with whom you  
18 dealt?

19 MR. VERDE: Primarily was Martin Shkreli.

20 THE COURT: All right. And is there anyone else  
21 that you dealt with?

22 MR. VERDE: Yes. We tried to -- it's difficult  
23 because of the volume of emails, but I could probably best  
24 explain through the numbers.

25 THE COURT: Okay.

1 MR. VERDE: We have approximately 85,500 emails all  
2 in related to Retrophin that we recovered. During the period  
3 that we looked between the indictment period of November 1st,  
4 2012 and March 31th, 2014, we have three -- just  
5 coincidentally, exactly 3,333 emails between Mr. Greebel and  
6 Mr. Shkreli.

7 THE COURT: What about other lawyers at Katten who  
8 did work?

9 MR. VERDE: There were 28 different custodians, 28  
10 different attorneys who worked on various matters, and there  
11 are 22,871 emails between those other attorneys and Martin  
12 Shkreli.

13 THE COURT: All right. And were these emails for  
14 work done on the behalf of Retrophin, MSMB or Mr. Shkreli?

15 MR. VERDE: Well --

16 THE COURT: I mean, do you have a way to quantify?  
17 Because I think MSMB documents are not at issue anymore,  
18 correct?

19 MR. VERDE: Well --

20 THE COURT: As far as I understand from Mr. Shkreli,  
21 who was the principal and Mr. Biestek's attorney, and based on  
22 Mr. Brafman's November 16th letter, MSMB is not asserting any  
23 sort of privilege right now?

24 MR. VERDE: Right. So when we had the meet and  
25 confer, we thought that would be okay to produce them.

1 THE COURT: Right.

2 MR. VERDE: That's when Retrophin said, Retrophin,  
3 Inc. -- Retrophin, LLC, existed and they said that they would  
4 object to those productions to the extent that they involve  
5 Retrophin in any way. And so we went back to now trying to  
6 figure out what that means in the context of MSMB.

7 MR. SHAPIRO: Just to clarify one point which might  
8 help, it's not whether or not those documents involved  
9 Retrophin in any way. It's whether or not Retrophin was the  
10 client in the communication reflected in those documents.

11 And so, if there's some reference to Retrophin, but  
12 it's clear to Mr. Verde and lawyers in his firm that they were  
13 not providing legal advice to Retrophin in that particular  
14 context, then we have no objection to turning over that  
15 document.

16 THE COURT: But, you know, I think you need to just  
17 figure out document-by-document, if you're taking the position  
18 that every document could be subject to Retrophin's privilege.  
19 You need to get in there and figure out what really matters  
20 and what --

21 MR. SHAPIRO: That's fine. If we get in there and  
22 we actually make determinations of categories of documents  
23 that we're not asserting privilege over them as a way of  
24 expediting this process, we'll do that, as well.

25 THE COURT: And what legal authority do you think

1 bars Mr. Shkreli as the principal representative of Retrophin  
2 during this period in which Katten was retained by Mr. Shkreli  
3 to do legal work on behalf of Retrophin? What precludes him  
4 from going in and reviewing those documents and deciding also  
5 what -- which of those documents might be Retrophin documents  
6 versus MSMB documents or documents that pertain only to  
7 himself and his own legal issues?

8 MR. SHAPIRO: Well, I think since he's no longer an  
9 officer or director of the corporation, he doesn't have a  
10 right to those privileged documents.

11 THE COURT: Wouldn't you agree that he's in the best  
12 position to know whether or not the work that Katten was doing  
13 at the time pertained to Retrophin or MSMB or to simply  
14 himself or his relatives? Maybe Katten did work on a closing  
15 for an apartment or a will for somebody. We don't know.

16 MR. SHAPIRO: I think honestly, though, I think it  
17 gets confused, Your Honor. Mr. Shkreli at a prior point in  
18 time, his counsel had asserted personal privilege in a number  
19 of these documents which Judge Weinstein addressed. You know,  
20 at this point, I think we are in a fair position to evaluate  
21 that, and if we can't evaluate it, we'll take it up with  
22 Mr. Brafman.

23 MR. BRAFMAN: Your Honor, I remind everyone, most  
24 respectfully, that Judge Weinstein's decision was based on an  
25 ex parte submission by the Government. We were not a party to

1 those proceedings. Subsequently, we decided not to appeal  
2 Judge Weinstein's order without agreeing that the Crime-Fraud  
3 Exception applied because we wanted the materials and intended  
4 to use the material. So I think it's unfair to say that, you  
5 know, we litigated that issue.

6 And the reason Mr. Shapiro can't provide Your Honor  
7 with any authority to support his position is because there  
8 isn't any, and the reason there isn't any is because it's rare  
9 to have a confluence of facts that you have in this case where  
10 there's already been a limited waiver.

11 I read the Wells Fargo decision by Judge Furman,  
12 thinking that that might offer some guidance, but A, that is a  
13 civil case; and B, while there is dicta in there to suggest  
14 that it could apply to a criminal case, there was no issue of  
15 partial waiver in that decision. So I don't think there is  
16 any precedent directly on point that would guide Your Honor in  
17 this case.

18 THE COURT: There may be not precedent, but there is  
19 a Second Circuit case decided in October 2015, *In Re: Grand*  
20 *Jury Subpoenas*. It arose from when the U. S. Attorney's  
21 office served a subpoena on an investment company whose  
22 president and owner was a subject of a grand jury proceeding.

23 And the district judge, Judge Caproni in that case,  
24 held that the Crime-Fraud Exception overrode the  
25 attorney/client privilege. The Second Circuit agreed that

1 was the case. Now, in that case, the Circuit held that  
2 because the company owner and president was the source of the  
3 investigation and because the owner, quote, appeared to have  
4 been using lawyers to further his fraudulent scheme, that the  
5 documents that were in the possession of the company who  
6 objected to production on attorney/client privilege grounds  
7 had been breached by the Crime-Fraud Exception.

8 MR. SHAPIRO: And we're not -- we're not objecting  
9 to the production of documents that are within the scope of  
10 our waiver, which is largely coextensive to the superseding  
11 indictment. I think that there might be one other topic in  
12 the superseding document that wasn't within the scope of our  
13 waiver. We're not proposing to withhold those documents, but  
14 we also don't think that Mr. Shkreli should be the person to  
15 decide on a case-by-case basis whether certain types of  
16 documents are within the scope of the waiver or well beyond  
17 the scope.

18 THE COURT: Well, what are you saying?  
19 Mr. Brafman's argument that because you don't have anyone  
20 currently at Retrophin who could know or make the  
21 determination about the legal services that Katten was  
22 providing to Retrophin during the relevant time on the  
23 relevant issues that Mr. Shkreli should be included in the  
24 process of determining what documents may pertain to Katten's  
25 legal work on behalf of Retrophin or Mr. Shkreli?

1 MR. SHAPIRO: So I think there are a number of -- I  
2 think we are comfortable that we understand to a significant  
3 degree what services were being provided to the company and  
4 why legal services were provided and how legal services were  
5 being provided, particularly as it relates to the transactions  
6 in this case.

7 So I think we are going to be able to look at those  
8 Katten communications and determine whether or not Katten was  
9 providing legal advice to Retrophin or to MSMB. And if it's  
10 MSMB, there is no assertion of privilege anymore, then we're  
11 not going to have an objection to turning those documents  
12 over.

13 THE COURT: Can I understand something though? When  
14 Judge Weinstein made his ruling on the Crime-Fraud Exception,  
15 was that in response to a subpoena that the government had  
16 served on Retrophin?

17 MR. SHAPIRO: That is correct, Your Honor.

18 THE COURT: And was there only one subpoena served  
19 or were there two? And did the waiver that Retrophin gave,  
20 the limited waiver, was that in response to the subpoena, that  
21 it was a subject of Judge Weinstein's order or was it a  
22 different -- was it a different subpoena?

23 MR. SHAPIRO: Your Honor, the company received a  
24 subpoena in the summer of 2014, when Katten was still counsel  
25 and then received another subpoena in early 2015.

1 THE COURT: I'm sorry. What were the dates again,  
2 2014?

3 MR. SHAPIRO: Yeah. In the summer of 2014, maybe  
4 May and then another subpoena in January and February of 2015.

5 And the company made a limited production in  
6 response that that first subpoena. And then the company made  
7 a number presentations to the government, where we reviewed  
8 documents that we collected on certain topics with the  
9 government, and then those documents were produced to the  
10 government, and then the company received certain additional  
11 requests from the government to produce documents.

12 At a certain point, the company -- the government  
13 asked us whether or not the company would consider waiving its  
14 privilege on certain enumerated topics and also suggested that  
15 the Crime-Fraud Exception might apply with respect to those  
16 subjects and ultimately, after some consideration, the company  
17 decided to waive with respect to those topics.

18 THE COURT: That was in September of 2015?

19 MR. SHAPIRO: No, that was by July of 2015 that the  
20 company had made this decision. It may have been a little bit  
21 earlier. And in --

22 THE COURT: So where is that letter where you  
23 defined your waiver?

24 MR. SHAPIRO: The --

25 MR. VERDE: It's attached to Exhibit A to our



1 response, Your Honor.

2 THE COURT: Okay. Because what I have is a  
3 September 30th, 2015 letter, Katten --

4 MR. SHAPIRO: The company effected the waiver much  
5 earlier than that, Your Honor, two or three months earlier  
6 than that. And in civil litigation that was then pending in  
7 the Southern District, Your Honor, we produced additional  
8 documents in that Southern District litigation, not the  
9 litigation that we subsequently filed against Mr. Shkreli. It  
10 was a short swing case involving Mr. Shkreli in the Southern  
11 District.

12 We produced additional documents in that litigation  
13 because the company had decided to make the waiver. And when  
14 we produced additional documents in that Southern District  
15 litigation, we received a letter from Mr. Shkreli's  
16 then-counsel at Arnold and Porter, arguing that Mr. Shkreli  
17 might have a personal privilege in some of the documents that  
18 we had just produced.

19 And so we let the government know that Mr. Shkreli  
20 was asserting a personal privilege in some of the documents  
21 that we had just produced pursuant to the waiver, and the  
22 government directed us to prepare binders on the enumerated  
23 topics that included the non-privileged documents that we  
24 previously reviewed with the government, as well as additional  
25 privileged documents that had not been previously reviewed

1 with the government. And those binders with the  
2 non-privileged and privileged documents on the enumerated  
3 topics were presented to Judge Weinstein for his consideration  
4 as to whether or not Mr. Shkreli had a personal privilege in  
5 those documents.

6 MR. PAES: And just to add to -- I agree with what  
7 Mr. Shapiro said. Just one point at the end. When we made  
8 our application to Judge Weinstein, it was based on the  
9 non-privileged set of findings, and the application was based  
10 on that and --

11 THE COURT: You made your application to Judge  
12 Weinstein on what?

13 MR. PAES: With the Crime-Fraud Exception and the  
14 fact that, you know, personal privilege may apply. That  
15 application was based on the non-privileged binder set that we  
16 received from Retrophin, and we made the application based on  
17 that.

18 Judge Weinstein then directed Cooley to present him  
19 with the documents that were -- the privileged set of the  
20 binder and made his ruling following an in camera review. He  
21 thought the privilege in terms of what the government had not  
22 seen at that point in time. We only received that binder  
23 after Judge Weinstein's ruling.

24 MR. BRAFMAN: Your Honor --

25 THE COURT: Well, Judge Weinstein says that the

1 company redacted documents on the theory that they may contain  
2 privileged information between a former employee and a former  
3 attorney, and are covered by the attorney/client privilege.  
4 The Court finds that are not subject to an attorney/client  
5 privilege of the employee, Mr. Shkreli, because these  
6 documents were the company's property.

7 And then the judge said the company has waived its  
8 own attorney/client privilege with the attorney. I don't  
9 quite understand what that means, but you can put that in  
10 context.

11 MR. SHAPIRO: Let me briefly -- having made the  
12 waiver, Your Honor, we were prepared to produce the documents  
13 subject to the waiver to the government, but Mr. Shkreli's  
14 counsel said that he might have a personal privilege in those  
15 documents.

16 And so, before we turned those documents over to the  
17 government, in light of Mr. Shkreli's assertion of a personal  
18 privilege in those documents, those documents were submitted  
19 to Judge Weinstein for in camera review to determine whether  
20 or not Mr. Shkreli's assertion of a personal privilege  
21 prevented the company from turning those documents over --

22 THE COURT: All right. So then the judge redacted  
23 certain portions of those documents and ordered that the  
24 remainder of the --

25 MR. SHAPIRO: By and large with respect to what we

1 had redacted to protect Mr. Shkreli's assertion of personal  
2 privilege, the judge said that those portions of those  
3 documents were not subject to his personal privilege. There  
4 were a handful.

5 THE COURT: What about your privilege?

6 MR. SHAPIRO: Right. With respect to the enumerated  
7 topics, we waived the privilege. We didn't seek to redact any  
8 of that. There were a handful of sentences or pieces of  
9 documents in those four binders that related to topics that  
10 were well outside of the waiver and over which the company  
11 asserted privilege. And so Judge Weinstein allowed us to  
12 maintain a handful of redactions where there was a privilege  
13 implicated that was totally unrelated to the waiver.

14 MR. BRAFMAN: Can I ask a question, Your Honor?  
15 It's one thing for a defendant pre-indictment to try to assert  
16 a privilege to keep his personal materials from review by the  
17 government, the Court, which is quite understandable. I'm not  
18 criticizing Arnold and Porter, who was predecessor counsel.

19 But now we're way down the road and what we are  
20 living with without necessarily agreeing is Judge Weinstein's  
21 finding that there was a Crime-Fraud Exception that allowed  
22 those documents that Mr. Shkreli would otherwise have  
23 privilege to be produced. It also impacts on Mr. Greebel's  
24 ability to assert any privilege, which he doesn't have because  
25 they're not his documents.

1 But the issue in question is the Court -- and Judge  
2 Weinstein found with respect to Retrophin that they were  
3 required to produce them because the Court found a Crime-Fraud  
4 Exception applied to those records, and Retrophin produced  
5 them. The Crime-Fraud Exception is now front and center  
6 because the government has named Mr. Greebel as a co-defendant  
7 in this case. Mr. Greebel is a partner or was a partner in  
8 the Katten Firm during period in question.

9 It just seems to me impossible for us to defend this  
10 case including, quite frankly, Mr. Greebel's ability to defend  
11 the case against him without having access to the full  
12 universe of Katten documents that were developed, maintained  
13 while he was a partner at that firm, and Katten is not the  
14 obstacle here. Katten is prepared to produce it, not stand on  
15 ceremony. They just don't want the responsibility,  
16 understandably, of making the privilege decision.

17 And I don't think that Retrophin has either  
18 presented Your Honor with any authority for its position, has  
19 in any way responded to the fact that there is a partial  
20 waiver that you cannot selectively invoke in a case like this.

21 And Your Honor, to hear that there were twenty-odd  
22 lawyers working on this case, it's humanly impossible to go to  
23 these people and say when you billed your time against the  
24 Retrophin time sheet, what were you doing at the time, without  
25 actually looking at the time records? And I will venture a

1 wild guess that virtually the majority of the time billed  
2 had -- in part, reflects on work performed on behalf of Martin  
3 Shkreli -- because during the period in question, Martin  
4 Shkreli was, as a practical matter, Retrophin, because he's  
5 been charged with essentially running Retrophin and running it  
6 in a criminal -- in a criminal manner.

7 And I think in order to have access to these  
8 materials, I think Retrophin has very, very weak -- a very,  
9 very weak position, and given the amount of materials outlined  
10 by Mr. Verde that are involved, it's going to take months if  
11 we do it section-by-section.

12 And if you give it to us and we agree to give it to  
13 the government, we can figure out what's there. We can ignore  
14 or give back the materials that we don't think are relevant.  
15 We can do it under a protective order, so that Retrophin  
16 documents aren't circulating in the legal industry. This is  
17 no different than when the government gives us something  
18 that's under a protective order, and you have to trust the  
19 lawyers to act responsibly.

20 I think if you want to, Your Honor, keep the  
21 schedule that I think we all want to keep, we need to move  
22 this process forward and what Mr. Shapiro is suggesting is not  
23 going to move it forward and we'll -- ultimately, we'll be  
24 back before you.

25 THE COURT: Well, if he is going to insist on

1 asserting a privilege on behalf of his clients or his clients  
2 want to maintain that privilege, he's going to have to --  
3 they're going to have to pay him to move quickly and to devote  
4 the resources to getting this done.

5 MR. SHAPIRO: I understand.

6 THE COURT: All the documents are there. There are  
7 software programs that can help search, and if you don't think  
8 that's good enough, look at the documents, but you need to act  
9 quickly.

10 MR. SHAPIRO: We understand that, Your Honor.

11 THE COURT: I mean, I want these documents produced  
12 by the end of January at the very latest.

13 MR. SHAPIRO: We understand. And Your Honor, again  
14 --

15 THE COURT: How soon could you get through these  
16 documents, given what you've just described?

17 MR. SHAPIRO: What I would propose is that we report  
18 back to this group two weeks after we have had a sense to  
19 learn more about what's there.

20 THE COURT: Well, you said you have a good idea  
21 about five minutes ago. You said you had a good idea about  
22 what was there and you would be able to make a fairly quick  
23 assessment about what documents you would want to assert a  
24 privilege over.

25 MR. SHAPIRO: I have an idea about what transactions

1 there were of which Katten provided advice to the company,  
2 particularly in 2012, 2013 and 2014. There's obviously some  
3 disagreement about volume. There are internal Katten emails  
4 that were within the scope of the subpoena that we would have  
5 never seen at Retrophin. So we are -- I am asking for some  
6 time to size it up.

7 But, again, Your Honor, we are not seeking to use  
8 the waiver unfairly. If Mr. Brafman told me that he thought  
9 certain additional topics were important in order to defend  
10 against the indictment, then we would quickly talk to our  
11 client about potentially waiving on those, but Mr. Verde has  
12 said that most of these documents relate to commercial  
13 transactions that have nothing to do with the transactions --

14 THE COURT: Right. Ninety percent was, I think, the  
15 figure I heard, ninety percent of the documents have nothing  
16 to do with the case.

17 Was it you, Mr. Verde, or was it Mr. Shapiro who  
18 made that representation? I was stunned by that, but that  
19 also makes me think that this has to be put into hyper-speed,  
20 so we can keep on track.

21 MR. VERDE: Trying to work through the various  
22 matters that were open, some of them dealt with litigations,  
23 not anything involving the --

24 THE COURT: Right.

25 MR. VERDE: -- indictment. Some of them involved



1 transactional work that -- deals either consummated or not  
2 consummated.

3 Most of the things that we're talking about here  
4 seem to have been billed to a general number, and that number  
5 represents about somewhere about 20 or 30 percent of the  
6 overall total, which we're just trying to work backwards and  
7 then out of that, how much of that is directly related to the  
8 matters in the indictment. We're perfectly prepared to give  
9 everything to anyone, but just to give you some concept of the  
10 context.

11 MR. SHAPIRO: Even if it's seventy percent, we just  
12 don't understand how fairness requires us to turn over all of  
13 that commercial information.

14 MR. BRAFMAN: Can I explain it in a nutshell? If  
15 you are going to inject a reliance on counsel defense, which  
16 we have advised the Court that we intend to do so, the  
17 professional relationship between the defendant and the lawyer  
18 during the period in question shows that Shkreli doesn't do  
19 anything without checking with Katten and getting advice from  
20 Greebel on a whole host of matters -- sometimes 15 different  
21 matters in the same day -- is all relative to whether or not  
22 he had a good faith basis upon which to believe that he was  
23 getting good sound legal advice. So for them to tell me that  
24 on matters that aren't charged in the indictment, Martin's  
25 conferring with Mr. Greebel and his partners before doing

1 anything is not relevant is just not correct under the law.

2 THE COURT: Well, I'm just thinking I don't know  
3 whether the government would be willing to stipulate for  
4 purposes of trial that Mr. Shkreli had a relationship with  
5 Katten and conferred with them on X number of occasions, over  
6 X period of time on X number of matters, and that because the  
7 matters themselves are not relevant to the charges, you know  
8 --

9 MR. BRAFMAN: Your Honor, we could work that through  
10 if we got to that point. But what you have is -- and we'll  
11 have to see the billing records before we can explain that  
12 because the summary only says in that year, five thousand  
13 hours, which means a lot of people worked on a lot of things,  
14 but if you look at the time records, many of the consulting  
15 agreements, many of the settlement agreements, the  
16 relationships between many of the witnesses, there is  
17 correspondence. There is --

18 THE COURT: Do you have those billing records? You  
19 have the contemporaneous time sheets that showed what legal  
20 work was being done?

21 MR. BRAFMAN: We don't have the actual details. We  
22 have the summaries of the time records. We have what was  
23 turned over to the government. We don't have line-by-line  
24 items.

25 THE COURT: How detailed are the Katten records, the

1 billing records, Mr. Verde?

2 MS. SMITH: The records that we received are kind  
3 of -- I believe what Mr. Brafman is referring to are year-end  
4 totals. We do not have any kind of billing, day-by-day  
5 billing because that -- those billing entries as you know  
6 would themselves contain privilege information. So if there  
7 was a waiver, we may be able to get those entries, but often,  
8 it describes partner X worked on --

9 THE COURT: But they would give more detail as to  
10 whether or not the work being done was for MSMB, Mr. Shkreli  
11 or Retrophin, right? So that's why I was thinking there  
12 should be some way to correlate those contemporaneous daily  
13 billing records with the emails that are being generated  
14 contemporaneously, if there is any doubt as to what client was  
15 being served.

16 MR. PAES: Your Honor, if I may, just from a factual  
17 standpoint?

18 THE COURT: Yes?

19 MR. PAES: If I may, some of the problems that have  
20 arisen over here is because in some ways how Katten billed for  
21 the work and in some ways because of what the structure was.

22 So with respect to MSMB Capital, right, there was no  
23 overlap with MSMB Capital as a hedge fund existed while it was  
24 still functional, because that gets you to kind of January  
25 2011, and then the OREX transactions happened around that

1 time.

2 While there is still some work to be done with  
3 respect to, you know, the falling out and kind of dealing with  
4 investors or things along those lines with MSMB Capital, what  
5 becomes really confusing is MSMB Healthcare and Retrophin, LLC  
6 are in existence for the same time frame.

7 And you know, from our perspective -- again, we  
8 don't take any position as to whose privilege it is and who  
9 should claim it, but just for the Court to understand, these  
10 are two entities that are being both run by Mr. Shkreli at the  
11 same time, and from what we understand, at some point, the  
12 billing was just done to Retrophin regardless of where the  
13 work is actually being performed.

14 And I think because of the fact that MSMB Healthcare  
15 does end up investing in Retrophin at some point, and the fact  
16 that there's overlap between the individuals who are  
17 working -- it all runs from the same office at the same  
18 time -- I think is what's leading to some of these issues with  
19 respect to, you know, whose privilege it is, even though one  
20 party may say we waive it and Retrophin wants to maintain it.

21 It's a little -- in that time frame in particular  
22 and it continues actually even I think past 2012 and Retrophin  
23 becomes a publicly-traded company, there's still some issues  
24 involving MSMB that are still being sorted through. I think  
25 it's a little tricky, just so the Court understands in terms

1 of whose privilege. That's why we're having this back and  
2 forth.

3 THE COURT: All right. How many documents are at  
4 stake here in that time frame, during that period when there's  
5 overlap and some joining of it, if you can tell me? Because  
6 really, ultimately, we need to get to -- there's clearly MSMB  
7 documents that are not going to be at issue. Then we've got  
8 this sort of hybrid situation, which hopefully we can sort  
9 through, and then we're going to deal with the Retrophin  
10 documents, which I think may be implicated by waivers or by  
11 Crime-Fraud.

12 MR. VERDE: Mr. Paes is correct that at some  
13 point -- actually, to be specific, in April 2012, we issued  
14 our final bill to MSMB. And at that point, all the bills  
15 going forward were to Retrophin, but --

16 THE COURT: That you were saying it may not be  
17 strictly for Retrophin work?

18 MR. VERDE: That's correct. And we -- again, I  
19 don't have the facts on this issue, but Mr. Paes said during  
20 conversations at our meet and confer that he believed that  
21 Retrophin had paid for some of the MSMB work. So I really  
22 don't know in terms --

23 THE COURT: The fact that they paid doesn't mean  
24 they're the client, right? As we know --

25 MR. VERDE: I agree.

1           THE COURT:  -- people get their legal fees paid by  
2 all kinds of people and it doesn't implicate the privilege.

3           MR. VERDE:  Right.  But I mean, again, because we  
4 don't -- we will produce everything when we're ordered to, but  
5 in fairness, there is a period of time in 2012 into 2013,  
6 where it looks like they're moving away from MSMB and they're  
7 moving towards Retrophin as the primary platform for  
8 Mr. Shkreli's investment -- investment strategies.

9           And it's during that time -- I agree with  
10 Mr. Paes -- it's difficult to pull out whether they're talking  
11 about Retrophin, MSMB.  The advisory affects both companies.  
12 And that's really what we kind of broke down and frankly, I  
13 think even if you put this on Retrophin, for Retrophin's  
14 counsel, they're going to have the same problem.  And unless  
15 they take the position that there's issues involving both  
16 companies and the assertion of privilege by Retrophin blocks  
17 the entire email or portion of the email, this is going to be  
18 extremely difficult.

19           THE COURT:  Well, we don't know what Retrophin is  
20 going to do because they haven't been explicit or specific.

21           MR. BRAFMAN:  May I have a question?

22           THE COURT:  Yes?

23           MR. BRAFMAN:  I don't know why this question, quite  
24 frankly, isn't dispositive of the issue.  Judge Weinstein made  
25 a ruling that the Crime-Fraud Exception applied, and while he

1 had a small universe of materials that the government gave him  
2 to consider, the Court made the finding and we're stuck with  
3 it, if you will, that the relationship between the Katten  
4 partner who was representing Shkreli and Retrophin and Shkreli  
5 was not a privileged relationship and if it was privileged,  
6 the Crime-Fraud Exception waives the privilege.

7 THE COURT: And in that case, did Retrophin assert  
8 specifically a privilege or was it --

9 MR. PAES: Yeah. Well, I mean --

10 THE COURT: It seems that they did with regard to  
11 certain documents, but not really in a blanket way, the way  
12 they're doing it now.

13 MR. PAES: And also just to be clear, I think Judge  
14 Weinstein's ruling was confined to the four areas of the  
15 government inquiry that was set forth in the letter from  
16 Retrophin saying they agreed to waive it before Mr. Shkreli  
17 had asserted his own personal privilege.

18 So, you know, I agree with Mr. Brafman in the fact  
19 that obviously, Judge Weinstein ruled that the Crime-Fraud  
20 Exception applied, but it was not to the entire representation  
21 involving Mr. Greebel's work or for that matter, you know, the  
22 Katten Firm, because they represented that there were other  
23 partners. I know we dealt with Michael Rosensaft on some  
24 issues, for example, who is a partner at Katten, as well, who  
25 I believe represented Mr. Shkreli in SEC matters.

1 MR. VERDE: (Nods head affirmatively.)

2 MR. PAES: And so I don't think, for example, just  
3 that as an example that Judge Weinstein's ruling touches even  
4 on that representation. He's not suggesting that the  
5 representation by Katten on other matters, you know, impacts  
6 the Crime-Fraud Exception.

7 THE COURT: Okay. This is the problem -- yes?

8 MR. BRODSKY: I apologize, Your Honor. I just want  
9 to get a few words in.

10 THE COURT: Okay. It would have been nice to have  
11 heard from you earlier.

12 So on October 16th in the letter that Mr. Brafman  
13 handed in and certainly, by October 18th, when I said to the  
14 Retrophin folks, based on a footnote in Mr. Brafman's letter  
15 that Retrophin might have more to say about this, it would  
16 have been nice to have heard from you earlier than Sunday  
17 evening at seven o'clock.

18 MR. BRODSKY: Your Honor, what we were trying to do  
19 is correct what we thought, for clarity purposes, was some  
20 information provided in those letters. Our principal point  
21 was with respect to our pending bill of particulars, which I  
22 know is not an issue we should talk about today.

23 THE COURT: Not an issue that we're going to talk  
24 about here.

25 MR. BRODSKY: So we will not make a point about



1 that. What I did want to address is the issues that were  
2 addressed here today.

3 We -- first, Your Honor, respectfully, Judge --  
4 nobody is talking about paragraph six of Judge Weinstein's  
5 ruling, which is relevant. I know Your Honor has read it.  
6 Paragraph six of course, Judge Weinstein said he's not making  
7 a determination whether it's Crime-Fraud with respect to every  
8 specific document because he didn't have all the relevant  
9 facts. He didn't know all the interested parties involved.  
10 That's first. I know other people are saying it's Crime-Fraud  
11 broadly and generally, but Judge Weinstein in paragraph six  
12 couldn't tell, based on the records before him.

13 Second, Your Honor, we de-duped the documents  
14 generally that Citrin Cooperman provided and that Retrophin  
15 provided regarding the waived subjects. Retrophin did not  
16 produce all the emails that Citrin Cooperman did. So in other  
17 words, we have with respect to what Citrin Cooperman produced  
18 Retrophin communications, over a thousand documents that  
19 Citrin Cooperman produced with respect to Retrophin that  
20 Retrophin did not produce to the government. To us, that  
21 raises a question as to whether or not Retrophin, you know,  
22 how they're determining their waiver, what they're producing,  
23 what they're not producing. I just provide that for Your  
24 Honor's information.

25 THE COURT: Can you educate me and remind me, who is

1 Citrin?

2 MR. BRODSKY: Citrin Cooperman was outside  
3 accountants for Retrophin. They provided accounting advice on  
4 a regular basis to Retrophin with respect to their books and  
5 records. They weren't the outside auditor. That was Marcum.  
6 But on a regular basis, they were providing outside accounting  
7 services.

8 The third point I did want to make, Your Honor, that  
9 I think is relevant is that -- and I know we disagree  
10 respectfully with Mr. Brafman -- is that Katten was not  
11 representing Martin in his personal capacity. I know that  
12 Mr. Brafman has made that as part of his position.

13 THE COURT: Well, Katten hasn't really shed a lot of  
14 light on that.

15 MR. BRODSKY: And I suppose that may be a question  
16 for Mr. Verde.

17 Our understanding is that their representation by  
18 Katten started with MSMB Capital. It then morphed into a  
19 broader representation of MSMB, including MSMB Healthcare.  
20 MSMB Healthcare and MSMB Capital and Retrophin all had  
21 interrelationships, affiliations to each other.

22 And there are communications, Your Honor, as we  
23 understand it -- and I know there's a parsing of each  
24 individual communication -- but there are communications  
25 regarding MSMB Capital, MSMB Healthcare and Retrophin in the

1 same communication. And that is partly what's creating this  
2 issue.

3 And finally, Your Honor, most respectfully, there  
4 were other lawyers at Katten who were communicating with  
5 people at Retrophin, including for example, Marc Panoff, who  
6 was the chief financial officer of Retrophin. So there are  
7 communications beyond with Martin Shkreli and there may be  
8 communications with board members and people at Katten. And  
9 we haven't seen a lot of those communications, so those raise  
10 just other issues.

11 THE COURT: Those are probably the subject of  
12 Retrophin's assertion, the ones that don't have to do with  
13 Mr. Shkreli necessarily.

14 MR. PAES: Your Honor, and again, it would be easier  
15 for to us say that Katten did not represent Mr. Shkreli at  
16 all, but at least from what we have seen, even we have to  
17 concede that at least for some matters, including the SEC  
18 representation before the SEC, there were some transcripts  
19 where Katten obviously showed up representing Mr. Shkreli in  
20 his personal capacity.

21 So the only thing I would -- you know, I don't think  
22 it's actually factually correct to say that they did not  
23 represent him in his personal capacity at all, regardless, as  
24 you said, who paid the bill. At least there were some  
25 instances that we have seen that they did represent him in a

1 personal capacity.

2 MR. BRAFMAN: Your Honor, I appreciate that  
3 statement from the government. I also know that however much  
4 Mr. Greebel and his counsel would like to have perhaps never  
5 represented Mr. Shkreli, the fact is that the evidence is  
6 overwhelming that on many occasions, it was Mr. Shkreli who  
7 personally communicated with Mr. Greebel on a regular basis  
8 and received advice.

9 Now, whether it was an advice as to how you form a  
10 company, how you write a settlement agreement, how you write a  
11 consulting agreement -- Your Honor, at various times,  
12 Mr. Shkreli wore a lot of hats, but he was always Martin  
13 Shkreli, and if he's Martin Shkreli working at MSMB and Katten  
14 is providing legal services that he is authorizing MSMB to pay  
15 for, it's sort of absurd, quite frankly, to suggest that  
16 Mr. Shkreli was not personally represented by this firm during  
17 the overwhelming period in question.

18 And that's the tension between the defendants that I  
19 think will ultimately require a severance over the vigorous  
20 objection by the government, I assume, but we have a right to  
21 at least explore the issue to Your Honor's satisfaction.

22 THE COURT: All right.

23 Mr. Shapiro, did you have anything more to say?

24 MR. SHAPIRO: One small response to Mr. Brodsky,  
25 with reference to when the company made its waiver.

1           When the company made its waiver, the government  
2 asked us to include a subset of documents within that --  
3 within the waiver in the binders that were presented to  
4 Judge Weinstein. We've never been asked to produce all of the  
5 documents within the scope of the waiver. We don't have an  
6 objection to doing that if they're requested of us, but I  
7 didn't want there to be a suggestion that they were somehow  
8 deliberately withheld in any way.

9           MR. BRAFMAN: Could I just add one thing that  
10 Ms. Zellan reminded me of which I think matters a great deal?  
11 We're talking about representation of Mr. Shkreli and MSMB  
12 when these were start-up companies, not when they were  
13 companies that were in existence for a long time. So when  
14 you're representing someone who is starting a company, it's  
15 impossible to separate the person from the entity they're  
16 trying to create.

17           THE COURT: I agree, but I think what Retrophin is  
18 saying is that we have now transformed into Retrophin, Inc.,  
19 and we take the privilege with us from Retrophin, LLC into  
20 Retrophin, Inc., and we're asserting our privilege to the  
21 predecessor entity of Retrophin, Inc.

22           MR. BRAFMAN: I think they should have said that  
23 before they made a partial production and executed a partial  
24 waiver.

25           THE COURT: Right. From what I remember stating

1 their position to be is they made a very limited explicit  
2 waiver and it was only with regard to the government and it  
3 was only with regard to certain transactions and subject  
4 matters and not with regard to everything, so --

5 MR. BRAFMAN: Well, this may be the first time in my  
6 35 years of practicing in this building where a company was  
7 allowed to essentially limit its production response to a  
8 grand jury subpoena. When I represent a company, it's  
9 generally, give us every piece of paper you have and then it's  
10 up to us to go and modify.

11 So to the extent that they managed to limit its  
12 production only to matters that were consistent with the  
13 theory advanced by the SEC, Retrophin in its civil lawsuit and  
14 ultimately, the government, leads me to understand and, quite  
15 frankly, know that there is a lot of good stuff in the Katten  
16 files that will be very helpful to Martin Shkreli, and I'd  
17 like to have them before the trial.

18 THE COURT: All right. Why don't you -- or why  
19 haven't you or someone in your firm spoken with Mr. Shapiro on  
20 behalf of Retrophin, to try to talk about a broadening of  
21 their limited waiver? There might be things that they will  
22 give you.

23 I just want to define the perimeters of the dispute,  
24 all right? Because right now, as much as I credit the  
25 attorneys for trying, I'm not sure it's gotten any narrower.

1 The one thing we've accomplished is we've gotten MSMB out of  
2 the way.

3 But there's this hybrid. We don't really know who  
4 is being -- what client was being represented at the time this  
5 email might have been generated with this memo. There's that  
6 hybrid stuff and there is also I think Retrophin is willing to  
7 waive even documents or communications that are pertinent to  
8 the charges in the indictment, and certainly pertinent to  
9 their lawsuit. Those should not even be in dispute. So what  
10 remains? What remains in dispute?

11 Retrophin can't sue Mr. Shkreli and allege similar  
12 acts of wrongdoing and then hide behind the attorney/client  
13 privilege.

14 MR. SHAPIRO: Your Honor, the waiver we made we  
15 think encompasses the indictment except for one transaction  
16 related to a \$900,000 that was in the superseding indictment,  
17 and we would -- I need to address this with my client, though  
18 I expect that we would be prepared to extend the waiver to  
19 include that additional transaction.

20 THE COURT: So authorize Katten to give that to  
21 Mr. Shkreli.

22 MR. SHAPIRO: I have to talk to my client about  
23 that.

24 THE COURT: All right.

25 MR. SHAPIRO: But that's an example of something

1 that's in the indictment, but that's not yet in our waiver  
2 because it wasn't on the table when we made our waiver.

3 Now, with respect to our civil complaint, there may  
4 be -- there are subjects in that civil complaint that are  
5 beyond the scope of our waiver. I don't -- I don't recall at  
6 this point because this is more than a year ago, but I think  
7 where we have not relied on attorney/client communications in  
8 making claims in that civil complaint, I don't believe that we  
9 would have waived the privilege in those instances where we're  
10 not relying on attorney/client communications and using the  
11 privilege as a sword and a shield.

12 Having said that, if in the course of my  
13 communications with Mr. Brafman, there are limited additional  
14 topics where we can cut through all this by expanding the  
15 scope of our waiver, I will absolutely take that up with my  
16 client and try and eliminate most of this dispute.

17 THE COURT: All right. Can you do that within one  
18 week from today, please? Because --

19 MR. SHAPIRO: Of course. I need to hear from Mr.  
20 Brafman about where he --

21 THE COURT: Well, this is the thing. Mr. Brafman, I  
22 know you want everything and I understand that's your job, and  
23 you may well get everything. But why not, since there are  
24 overtures being made to try to cut through some of this and to  
25 define and narrow the matters in dispute, so that Katten can



1 decide or once an order is made by myself to decide, you know,  
2 how quickly you can get those documents out to everybody? Why  
3 don't you try to narrow the dispute for now without prejudice  
4 to any of your rights, your client's rights, and then we'll  
5 figure out what's left in the fight?

6 Do I have to look at an in camera, you know, volume  
7 of documents? What is the magnitude of that review, in camera  
8 review, if I have to go there? I would like you to try to  
9 eliminate and narrow it as much as possible what's in dispute.  
10 If he's offering to waive more, take it. Get the documents.

11 MR. BRAFMAN: I will, but, Judge, to be candid,  
12 Judge, it took -- I was preparing for a suppression hearing,  
13 but monitoring the emails on a daily basis. It took almost  
14 two weeks to get the lawyers to agree on a meet and greet  
15 date, which then had to be done by telephone conference  
16 because everyone was very busy.

17 I'll take you up on that offer, but normally, Judge,  
18 when we're not flying blind, we're looking at a privilege log  
19 and we say we need categories 20 through 60 -- I don't think  
20 in all the months that they've done this that they have  
21 created a privilege log.

22 THE COURT: Oh, I'm ordering them to do that. I  
23 want it, you know, I want it sooner rather than later.

24 And your client is going to have to spend the money  
25 to get them to do it. And I understand that that is an

1 expense they have to bear, but, you know, you're required to  
2 give a privilege log, so that we know what the scope of the  
3 privilege is.

4 MR. SHAPIRO: I don't -- I don't recall us  
5 withholding documents on the ground of privilege or the  
6 government asking us to produce.

7 THE COURT: No, but you're prohibiting Katten from  
8 providing --

9 MR. SHAPIRO: I can't prepare a privilege log on the  
10 documents in Katten's possession because I've never seen them.  
11 And this comes back to what I had said at the beginning of the  
12 afternoon. If Katten were to prepare a list of the matters  
13 for which they gave, provided advice to Retrophin and MSMB,  
14 then Mr. Brafman can take a look at that list and say there  
15 are these ten matters where we would like you to waive the  
16 privilege or go to Katten and make a decision. Are you going  
17 to waive the privilege or are you going to log those  
18 documents?

19 That, to me, seems like the best and quickest way  
20 for us to get Mr. Brafman the source of documents he wants  
21 without insisting on a wholesale waiver of the company's  
22 privilege.

23 THE COURT: No one is insisting on a wholesale  
24 waiver. What I'm insisting on is that you provide a privilege  
25 log for those documents that you are asserting a privilege

1 over.

2 MR. SHAPIRO: That's Katten documents.

3 THE COURT: That's what you're asserting a privilege  
4 over, am I correct? Unless you want to let Mr. Brafman go in  
5 there with Mr. Shkreli and look at the documents and they can  
6 decide.

7 MR. SHAPIRO: I understand. I understand.

8 THE COURT: I mean, somehow we have to get to it.  
9 Mr. Shkreli is one of the few people who can identify which of  
10 those emails that he sent or received pertaining to what  
11 matter. He's one of the few people, but you don't want him to  
12 do that.

13 MR. SHAPIRO: We're prepared to work with Katten as  
14 quickly as possible to identify whether there are documents  
15 over which we're asserting privilege and which of those are --

16 THE COURT: I mean, you may have to just go in and  
17 take a look at the documents and make a log. That's how it  
18 works.

19 MR. BRAFMAN: It wouldn't make any sense for us to  
20 confer with them until we get an alert from either Katten or  
21 Retrophin that they have a privilege log. And within a week  
22 after getting that, we'll report back to Your Honor.

23 But to give them a head start, we believe that any  
24 correspondence that relates to Martin Shkreli is not  
25 privileged, and it's his privilege to waive any emails that he

1 is either copied on or pertain to any of the matters in the  
2 indictment, he's entitled to.

3 And with respect to any invoicing, we think the  
4 billing records should not remain privileged. They can redact  
5 out -- we're not looking to see who they billed, other clients  
6 or what they billed them for. They can redact those billing  
7 records.

8 But any time sheets that reflect work done on behalf  
9 of Mr. Shkreli, MSMB or Retrophin, the lawyers, as I  
10 understand it, just don't bill. They write down "consulting  
11 agreement." They write down "correspondence." They write  
12 down "emails." Well, we're entitled to that and that's really  
13 a road map in this case.

14 So to get a jump start, I can't imagine how if they  
15 redact the billing records, getting our billing records that  
16 he paid for should be something they could stand on ceremony  
17 on. That would produce a great deal of material on the  
18 reliance of counsel defense and that's the process.

19 THE COURT: It's also not a communication. It's not  
20 a communication. Your billing records saying what you did for  
21 a particular client is not a communication made to a client,  
22 intended to bring privilege for the purpose of rendering legal  
23 advice is not a privilege, I don't think for the most part,  
24 unless there's something in there that amounts to a  
25 communication that would be privileged, but I would doubt it.

1 MR. SHAPIRO: Of course, unless there's something in  
2 there. I don't think --

3 THE COURT: All right. So let's authorize Katten  
4 right now to provide those billing records to Mr. Brafman.  
5 All right?

6 MR. PAES: And to the government.

7 THE COURT: And to the government.

8 MR. SHAPIRO: Your Honor -- Your Honor, I --  
9 respectfully, I would like to have a conversation with my  
10 client tonight of which --

11 THE COURT: Well, why haven't you had that  
12 conversation? You know there's billing records.

13 MR. SHAPIRO: Because we had not been asked to turn  
14 over Katten's billing records. We have in Katten --

15 MR. BRAFMAN: It was in a subpoena.

16 MR. SHAPIRO: We have a copy of Katten -- we happen  
17 to have a copy of Katten's billing records.

18 THE COURT: You've got the subpoena, do you not --

19 MR. SHAPIRO: We have the subpoena.

20 THE COURT: -- served? You know they want it.

21 MR. SHAPIRO: What we're prepared to do is take a  
22 day to look at those billing records, make sure there's  
23 nothing in there that we assert a privilege over and then  
24 we'll tell Katten they can turn them over to Mr. Brafman.

25 THE COURT: All right. And then you'll log it if it

1 is?

2 MR. SHAPIRO: Right.

3 MR. PAES: And the government?

4 THE COURT: And the government.

5 MR. BRODSKY: Respectfully, if the government gets a  
6 copy, if Mr. Shkreli's lawyers get a copy, I take it Your  
7 Honor won't object if Mr. Greebel also has a copy?

8 THE COURT: I'll hear from the parties.

9 Do the government and Mr. Brafman object to sharing  
10 with Mr. Greebel?

11 MR. BRAFMAN: I don't object to sharing.

12 THE COURT: Okay.

13 MR. PAES: We don't object either, Your Honor.

14 THE COURT: In this time of Thanksgiving.

15 MR. BRAFMAN: Yes, Your Honor. The spirit of the  
16 season.

17 MR. BRODSKY: May I share one other --

18 THE COURT: Yes.

19 MR. BRODSKY: -- in the spirit of Thanksgiving?

20 Respectfully, Your Honor, I know there's been a lot  
21 of discussion of who at Katten was representing, if anyone,  
22 Martin Shkreli personally. It's a hundred percent correct  
23 that in September of 2013 -- in or about September 2013, when  
24 Mr. Shkreli testified at an SEC proceeding, a Katten  
25 attorney -- not Mr. Greebel -- a Katten attorney, a partner at

1 Katten did represent MSMB and Mr. Shkreli at that testimony.  
2 And it is also correct, Your Honor, that there are hundreds  
3 of -- literally hundreds of communications between Katten  
4 attorneys -- including Mr. Greebel -- and Mr. Shkreli.

5 As Your Honor knows, when a corporation like  
6 Retrophin or any other corporation in America like Microsoft,  
7 Apple, Google, whoever it may be -- hires a law firm and that  
8 law firm, partners there communicate with the CEO, they're  
9 communicating and providing advice to the corporation.

10 And their understanding is, when they're  
11 communicating to the CEO, that they're representing the  
12 corporation and providing advice to the corporation, and not  
13 necessarily the CEO in his or her personal capacity. I just  
14 wanted to make that clear and not just assume -- and I know  
15 this is battle that the defendants will wage at a later time,  
16 Your Honor, possibly in connection with severance.

17 THE COURT: It's a fact-specific inquiry, and I  
18 don't think we can make any gross generalizations about that.  
19 I mean, think about MSMB and Retrophin, LLC, and they were  
20 essentially started by and operated by Mr. Shkreli. All  
21 right?

22 MR. BRODSKY: That's correct, Your Honor.

23 THE COURT: At the time, it wasn't a public company.  
24 There were not shareholders. It was his company.

25 And I think there is a way to move this forward. I

1 don't want to get bogged down in a lot of side litigation.  
2 Katten is willing and able to give documents to whomever  
3 ultimately I order them to provide to. And I don't think the  
4 government is objecting to Mr. Greebel's documents --  
5 receiving documents, are you?

6 MR. PAES: No, Your Honor.

7 THE COURT: All right. So let's do this. The  
8 burden is on Retrophin, since they are asserting the  
9 privilege, to act expeditiously in concert with Katten to  
10 review the documents, to make a privilege log and work with  
11 Mr. Brafman to try to narrow the privilege.

12 If he's willing to expand his waiver -- its  
13 waiver -- let me just strike that. If Retrophin is willing to  
14 expand its waiver, they should let Mr. Brafman know  
15 immediately and let Katten know, so they can provide the  
16 documents.

17 And I'm going to keep a very short time frame on  
18 this because the effect of this is delaying the motion  
19 practice that I had ordered, and I want to keep the case on  
20 track for trial in June. So it will require that Retrophin's  
21 counsel work hard and fast to get this done.

22 MR. BRAFMAN: With respect to the billing records,  
23 you're ordering them to produce them as soon as they've had an  
24 opportunity to speak to their client?

25 THE COURT: Right. And I would think that should



1 not take more than a few days. Tomorrow is not a holiday.  
2 Friday is not a holiday. Monday is not a holiday. So maybe  
3 in a week, you can let us know.

4 MR. SHAPIRO: The bills will be produced by Monday,  
5 subject to any redactions.

6 MR. BRAFMAN: That's fine.

7 THE COURT: All right. All right. What else can we  
8 cut through?

9 MR. VERDE: Just two things that may foreclose the  
10 need to come back for clarification. One is to the extent  
11 that anyone wants to see documents that are arguably MSMB  
12 documents, this would probably be a good time to make sure  
13 with everyone here who has a say in this that there is no  
14 objection to us giving what are arguably MSMB documents to  
15 Retrophin?

16 THE COURT: Is MSMB counsel here today? Did I  
17 overlook them?

18 MR. VERDE: I believe that's Mr. Brafman.

19 THE COURT: No, no. There was a lawyer on behalf  
20 of --

21 MR. BRAFMAN: Mr. McGorty represented Mr. Biestek.

22 THE COURT: Who?

23 MR. BRAFMAN: Glen McGorty.

24 THE COURT: McGorty? Is he here?

25 MR. BRAFMAN: He represents -- no, he's not, but he

1 was on the call, Your Honor, and he affirmatively waived them  
2 on behalf of Mr. Biestek.

3 THE COURT: Does anybody dispute that?

4 MR. VERDE: He didn't waive as much as he said. He  
5 conceded that it's Mr. Shkreli's privilege to assert. So I  
6 just want to be clear that if we're asked by Retrophin to give  
7 all the documents that may also be MSMB, there is no  
8 objection.

9 MR. BRAFMAN: No objection.

10 MR. VERDE: And the second thing that will make this  
11 such speedier is to the extent that Mr. Shkreli's counsel and  
12 Retrophin's counsel agree on expansion of the waiver, if they  
13 could convey their instructions to us in terms of search terms  
14 and dates rather than descriptions because --

15 THE COURT: Right.

16 MR. VERDE: -- otherwise, we're going to be back in  
17 the same morass.

18 THE COURT: Right. And you know, Katten is  
19 incurring a lot of expense for no client but just its own --  
20 its own time and effort in trying to accommodate these  
21 competing positions.

22 MR. VERDE: Yeah. We're big boys. We're okay with  
23 that. We just -- the one thing we just keep trying to avoid  
24 is having to make judgment calls about what -- how to  
25 interpret an instruction. So if we get something that's

1 mechanical, that is, date range, you know, certain terms are  
2 included, certain terms are excluded, however the parties can  
3 work that out, if they should work to an agreement on those  
4 terms, then we can execute on it right away.

5 THE COURT: All right. So Mr. Brafman and Mr.  
6 Shapiro, you understand what Katten needs? I expect you to  
7 move quickly. I could ask for a status update within a  
8 certain number of days. I would hope that, you know, you all  
9 move more quickly towards a resolution, and that if there is  
10 going to be a universe of documents I have to review in  
11 camera, you will not burden me with banker's boxes full of  
12 documents.

13 MR. BRAFMAN: Your Honor, could we also ask  
14 Retrophin's counsel, since MSMB is no longer an issue, I know  
15 that they have certain MSMB records that Retrophin has, if  
16 they could return them to Mr. Shkreli or his counsel?

17 MR. SHAPIRO: Your Honor, Retrophin has an email  
18 server. There are many -- there are MSMB emails on that email  
19 server. There are also MSMB documents on Retrophin's systems.  
20 Under the company's email policy and other systems policy, all  
21 of those documents are now Retrophin's property.

22 At some point in the past, we turned over to  
23 Mr. Shkreli's counsel all of the hard copy MSMB documents that  
24 had been lying around or copies of those documents. It would  
25 be --

1 THE COURT: Did you print everything? You printed  
2 everything that was from the email server and gave it to --

3 MR. SHAPIRO: No, Your Honor. Separate and apart  
4 from the email server, if there were hard copies of MSMB files  
5 that were at Retrophin, we provided copies to Mr. Shkreli's  
6 counsel.

7 What we are reluctant to do is undertake the burden  
8 of going through this enormous email server to find any email  
9 that's arguably an MSMB email rather than a Retrophin email.  
10 Mr. Shkreli sent and received those emails on Retrophin's  
11 email server, and they're stored on Retrophin's email  
12 archives. Under the company's email policy that Mr. Shkreli  
13 adopted, all of those communications are now Retrophin's  
14 property.

15 MR. BRAFMAN: But Your Honor -- but Your Honor,  
16 they're his property. He was MSMB. They are not owned for  
17 perpetuity by Retrophin and it's fairly easy if we do a search  
18 electronically to identify that. I'm not asking you to do it  
19 for tomorrow, but those are not yours to retain.

20 MR. SHAPIRO: Your Honor, legally, we contend that  
21 they're the company's property.

22 THE COURT: So your policy, which I have yet to see,  
23 is that if I were one of your employees and I communicated  
24 with my doctor about a medical issue, that would be  
25 Retrophin's, not the personal --

1 MR. SHAPIRO: That's what the email policy says, and  
2 Judge Weinstein relied on it in finding that Mr. Shkreli  
3 didn't have a personal privilege of the documents. We tried  
4 to --

5 THE COURT: All right. But you don't have a  
6 privilege over the MSMB documents?

7 MR. SHAPIRO: No, no, no.

8 THE COURT: Even though they're yours, if they  
9 served a subpoena on you for MSMB documents, you would have to  
10 produce them because they're not privileged and they're  
11 entitled to it, no?

12 MR. SHAPIRO: Yes. If they served a subpoena on us  
13 for those documents, we would have to produce copies of those  
14 documents to Mr. Shkreli.

15 THE COURT: All right. So serve the subpoena and  
16 you'll get them.

17 MR. BRODSKY: I have a relevant fact with respect to  
18 the issue --

19 THE COURT: Yes?

20 MR. BRODSKY: -- of the email control. I don't know  
21 whether or not there's a separate MSMB server that was left  
22 behind at Retrophin and then another Retrophin server. My  
23 understanding was that Retrophin is in possession of its MSMB  
24 server, and then they're also in possession of a Retrophin  
25 server.

1           My second understanding, Your Honor, from reviewing  
2 the discovery, we did search for Retrophin email policy -- and  
3 Mr. Shapiro, correct this if we're wrong -- we may not have  
4 the relevant policy, but the one that was produced in  
5 discovery was dated September 2013, and it seems to us that  
6 Retrophin, if that is the policy that they're relying on, that  
7 it's hard for them to argue that it's retroactive to MSMB  
8 email communications prior to September 2013.

9           In other words, if Retrophin had an email policy in  
10 September 2013 and informed its employees that from now on, if  
11 you communicate over our server, we own it, it doesn't apply  
12 to August of 2013 or August of 2012, and I don't know what  
13 policy they showed to Judge Weinstein, but that's the policy  
14 that was produced in discovery.

15           I also know, Your Honor, that there's case law out  
16 there that if a company bears a heavy burden in proving to  
17 federal courts that their email policy is so explicit that it  
18 warrants a waiver of communications unrelated to the  
19 company -- the email policy we read from September 2013 from  
20 Retrophin is about as vague as one can get from our  
21 perspective, when we compare it to other policies. So I do  
22 think that would be an issue Your Honor would want to look at.

23           THE COURT: I don't want to look at it. I want you  
24 to work it out, but I will look at it if I have to.

25           MR. PAES: I don't think it's an issue, given that

1 Retrophin has said they would produce it to Mr. Shkreli.

2 THE COURT: Pursuant to subpoena.

3 MR. PAES: So I don't think that we need to get into  
4 the issue of the law on, you know, waivers based on policies,  
5 Your Honor.

6 THE COURT: All right. It's like \$15 to get a  
7 process server to drop a subpoena on them. Maybe they'll take  
8 it by email, right?

9 MR. BRAFMAN: Yes, Your Honor.

10 THE COURT: Will you take it by email?

11 MR. SHAPIRO: Of course. Of course.

12 THE COURT: What else?

13 MR. PAES: Well, hopefully nothing else.

14 I just wanted to know if the Court wanted us to even  
15 address what we believe was somewhat of a surprising letter.

16 THE COURT: Yes. Why don't you, because we have the  
17 bill of particulars under advisement, and I did think it would  
18 be fair to allow the government to respond to give -- this  
19 letter dated November 20th.

20 Did you want to respond, Mr. Paes?

21 MR. PAES: Sure. I mean, just for one, obviously,  
22 we're on this call where we're trying to sort through  
23 representation issues, as I'm sure now the Court is aware of  
24 are at the very least complicated and involve different  
25 parties having different claims.

1           During the course of the -- and by the way, this is  
2 all done by telephone conference, so it's not that the  
3 government was sitting across the table from Mr. Brodsky, so  
4 he could ascertain surprise, for example, in the event of the  
5 government saying, well, we're surprised at this. So we  
6 thought it was kind of, you know, interesting that the  
7 government's position or reaction was characterized on this  
8 call as being surprised by it.

9           What happened was, there was a question that was  
10 posed to understand a fact which is because we don't have the  
11 bills, because we don't know what the representation issues  
12 were, and we know that Mr. Shkreli -- and the government has  
13 never alleged in any of its filings or submissions that  
14 Mr. Greebel assisted Mr. Shkreli with that filing with the  
15 SEC.

16           So -- but in light of some of the issues regarding  
17 representations and billing, we did ask when we were on the  
18 phone in this call as a factual matter, because, you know, one  
19 could argue it could help the government knowing this or maybe  
20 doesn't because you have to advise the government -- we asked  
21 if Katten represented Mr. Shkreli when he was responding to a  
22 request from the SEC in September 2012. Mr. Verde said --

23           THE COURT: It was 2013?

24           MR. PAES: No, no, no. 2013, I think there's no  
25 dispute that Katten did represent Mr. Shkreli.



1 THE COURT: Okay.

2 MR. PAES: 2012 is when Mr. Shkreli -- and from what  
3 we can gather through what was produced in discovery responded  
4 directly to the SEC providing information about the MSMB files  
5 at that time.

6 And so we asked the question, did Katten represent  
7 Mr. Shkreli in that inquiry by the SEC? Obviously, it's  
8 relevant to us if there's a fact out there that I'm aware of  
9 because if he did, we can expect, I'm sure, another advice of  
10 counsel or reliance on counsel defense with respect to that  
11 submission. So we did, and Mr. Verde said, no, he did not,  
12 and I said, are you sure? I just want to make sure we confirm  
13 that. And he said no.

14 As far as we are concerned, that was the end of the  
15 discussion. But somehow, that got characterized as a surprise  
16 by the government, that we were taken aback in some ways by  
17 learning of this fact and that it's somehow connected to a  
18 bill of particulars request. And the fact that they had asked  
19 for things in the bill of particulars, which I think we've  
20 gone over this. We've argued. If you ask for 20 different  
21 things, doesn't make it appropriate for a bill of particulars.

22 So one, I just want to let the Court know that I  
23 think it was a mischaracterization of our reaction to it,  
24 which I'm not sure how they ascertained we were surprised,  
25 given it was over a telephone conference call, given the fact

1 I didn't say, "I'm surprised." All I said was, "Wow. That's  
2 interesting, you know."

3 But anyway, that was put obviously before the Court  
4 and tried to connect it with respect to a bill of particulars  
5 request. We don't think that the Court needs anything beyond  
6 what it already has. If the Court would obviously like us to  
7 respond to this in writing, we are happy to. We don't see how  
8 it impacts the bill of particulars request. It's not what the  
9 indictment alleges.

10 The indictment just alleges that Mr. Greebel had  
11 knowledge of the facts of the situation of MSMB Capital at the  
12 time, you know, that he decided to backdate these documents  
13 and create an interest of MSMB Capital in the Retrophin cap  
14 table, and that's clear from the emails that have been laid  
15 out in the indictment as to what his knowledge was because he  
16 had the Retrophin cap table as early as June and July. And he  
17 saw that there was no MSMB interest in there and that was  
18 created obviously after the fact.

19 The indictment did not allege that Mr. Greebel in  
20 any way assisted Mr. Shkreli in a submission to the SEC, which  
21 had he done so -- and we were somewhat now surprised. You  
22 could see how that's a relevant fact. How it becomes relevant  
23 with respect to a bill of particulars, still, I don't get  
24 that. But they have asked for a lot of things in the bill of  
25 particulars which we don't believe they're entitled to. So

1 that's all I wanted to say on that issue, Your Honor.

2 THE COURT: Do you still -- are you satisfied now,  
3 Mr. Brodsky?

4 MR. BRODSKY: Respectfully, Your Honor, on the  
5 call -- On the call, Your Honor -- and I'll just move up, so  
6 you can hear me -- on the call, Your Honor, Mr. Paes said that  
7 for the benefit of Mr. Biestek's counsel, Glen McGorty -- he  
8 didn't ask a question. He said he made a statement, he said  
9 for the benefit of Mr. McGorty, he said -- and we put it in  
10 our letter. We were all on the call. We checked with  
11 Mr. McGorty as to the accuracy, and we checked with Katten's  
12 counsel as to accuracy before we submitted this.

13 He said there was an SEC inquiry in September of  
14 2012, and that Katten represented MSMB and Mr. Shkreli in  
15 responding to that inquiry. At that point, Mr. Verde stopped  
16 the conversation and said, "That's not so." He said that  
17 Katten did not represent anyone or do any work relating to the  
18 SEC investigation into MSMB and/or Mr. Shkreli in the year  
19 2012.

20 And he went on to explain that it was in 2013 -- in  
21 or about August of 2013 -- when Mr. Shkreli testified and he  
22 said -- Mr. Verde said a few months prior to that in the  
23 summer of 2013, that's when -- the first time Katten  
24 represented MSMB or Mr. Shkreli in connection with the SEC  
25 investigation. And then Mr. Paes asked, "Is that right? Is

1 that correct?" That's why we wrote he appeared to be  
2 surprised by the news.

3 Now, respectfully, Your Honor, a bill of  
4 particulars -- and we wrote appeared to be surprised. We  
5 certainly didn't say he is surprised. We wrote appeared to be  
6 surprised because he checked again with Katten if that  
7 information was correct.

8 THE COURT: Well, why wouldn't a careful lawyer do  
9 that, just to make sure that, you know, the time frame that's  
10 being represented and the representation of Mr. Verde's firm  
11 with regard to the personal representation of Mr. Shkreli was  
12 accurate?

13 MR. BRODSKY: I agree. He should check.

14 THE COURT: Okay.

15 MR. BRODSKY: But his first statement was  
16 inconsistent with what Mr. Verde then informed him. It  
17 appeared to us that he made a statement.

18 What's relevant here, Your Honor, is not really the  
19 back and forth. What's relevant to us is we appreciate the  
20 concession because we view it as a concession. If you cut  
21 through all the red tape here -- and we can disagree about  
22 whether he was surprised or not surprised -- to us, that's a  
23 red herring.

24 The key issue to us is the fact that Katten was  
25 representing for the first time MSMB and Mr. Shkreli in 2013

1 is relevant to our bill of particulars. Why? A bill of  
2 particulars is fair notice to the defendant about what charges  
3 we're facing. All we want, Your Honor, is fair notice. Tell  
4 us that you're alleging, so we can defend ourselves.

5 We're here for the indictment and we pointed out,  
6 Your Honor, we put in our brief that it appears to us -- and  
7 we weren't sure -- but it appeared to us the superseding  
8 indictment -- this is page two of docket number 92 in this  
9 case -- and what we wrote was, "The indictment assumes  
10 incorrectly that Mr. Greebel knew in 2012 that, A, Mr. Shkreli  
11 allegedly made false statements to the SEC; and B, Mr. Shkreli  
12 needed to, quote, fabricate an investment by MSMB Capital in  
13 Retrophin, LLC, end quote, for purposes of the SEC inquiry."

14 Now, what we were trying to get the government to  
15 tell us is whether or not they were alleging Mr. Greebel knew  
16 in 2012 that Mr. Shkreli, representing himself, was making  
17 false statements to the SEC, and that Mr. Shkreli,  
18 representing himself, was fabricating an investment in MSMB  
19 Capital to deceive the SEC, but the government refused to tell  
20 us that.

21 And so this revelation to us and this acknowledgment  
22 that Katten did not represent Mr. Shkreli or MSMB in the SEC  
23 case in 2012 is meaningful to us and it may not -- the  
24 government may not care. But it is meaningful to us if the  
25 government is saying here today -- we hope they will say here

1 today -- that they are not alleging in any way, shape or form  
2 that in 2012, Mr. Greebel knew Mr. Shkreli was making false  
3 statements to the SEC or that in 2012, Mr. Greebel knew Mr.  
4 Shkreli was deceiving the SEC about the MSMB Capital  
5 investment. That's what's important to us, not the back and  
6 forth on the phone call. But that allegation is significant,  
7 and it matters to our defense.

8 And Your Honor, most respectfully, when the  
9 government stands up and says, well, Mr. Greebel asked for 20  
10 things and that means he really is only interested in three --  
11 with all due respect to Mr. Paes, we are trying to defend a  
12 person, and we are trying to understand the allegations, so we  
13 can do that defense. That's all. And we believe this was  
14 significant. We repeated it multiple times, and it appears --  
15 we would like clarity that they are not alleging and do not  
16 allege that Mr. Greebel knew in 2012 about these false  
17 statements to the SEC. That's what we're asking for.

18 MR. PAES: Your Honor, I think throughout this bill  
19 of particulars, what they have tried to do is try to confine  
20 us to what we're not alleging.

21 What we have alleged in the indictment and what we  
22 have alleged is pretty clear. What they've tried to do is  
23 say, well, you know, kind of proving a negative. So all of  
24 these things, let's -- tell us if it's anything that you  
25 possibly could find out or possibly could learn in the course

1 between now and trial, tell us now that that's not part of the  
2 case.

3 How can we say that when we haven't received  
4 documents from Katten, for example? We don't know what the  
5 documents from Katten are going to show us with respect to  
6 what his knowledge was.

7 I can assure you if we knew and had evidence right  
8 now because we alleged duress in the document that Mr.  
9 Greebel, you know, explicitly knew in documentary evidence,  
10 you know, which they would know if it's in discovery. They  
11 would have it. We would have alleged it.

12 But that's not what a bill of particulars requires  
13 one to do. What they've tried to use the bill of particulars  
14 is to try to kind of cabin in and say, well, you know what?  
15 This is all you can try to look at. This is all you can try  
16 to prove. That's not the purpose.

17 The idea that Mr. Greebel doesn't know the charges  
18 against him, I find that to be one of the most, you know,  
19 unbelievable things I've heard because, one, the indictment is  
20 very clear. It gives examples of it. We provided more  
21 information as part of, you know, this request which we  
22 believed was not even required, but we did.

23 And so to stand up and say, you know, we're only  
24 trying to understand the charges against him -- if they don't  
25 understand the charges against him at this point, I don't know

1 what to expect in terms of going forward, in terms of what  
2 other questions or issues they may have with respect to  
3 severance. How could they have made a motion if they didn't  
4 understand the charges?

5 And here's what's also troubling. You know, their  
6 position changes with -- and we haven't had this issue,  
7 candidly speaking, you know, to some extent with counsel for  
8 Mr. Shkreli, where they had issues where we engaged in. We  
9 disagree on a lot of things, as Your Honor knows.

10 But we're at a point where we're concerned about  
11 having conversations that lawyers typically have with one  
12 another, trying to advance the ball because it may be  
13 mischaracterized in this instance. And we're at a point where  
14 we feel we need to maybe resort to just putting things in  
15 writing, because we don't want things to be taken out of  
16 context in this matter.

17 But, you know, today, you heard, for example, where  
18 it seemed very ironic that Gibson Dunn was now able to  
19 de-dupe, you know, Citrin Cooperman productions forces Katten  
20 productions to come up with something and realize that there  
21 was a discrepancy in that.

22 I'll just say for someone who knows a little bit of  
23 how technology works, that's pretty sophisticated technology  
24 to be able to do that. And listen to what they were saying  
25 previously with respect to their inability to review documents



1 and emails. I would just point out to the Court, as you are  
2 considering some of their requests, that stands in stark  
3 contrast to all of the complaints they were making about  
4 inability to wade through documents when they can perform  
5 de-duplications in two separate productions and figure out  
6 that Retrophin has not produced some emails that they received  
7 from Citrin Cooperman.

8 So I just want to, you know, point out to the Court  
9 because I think there's been a lot of, you know, bluster  
10 about something, a lot of accusations and lot of assumptions,  
11 and I just don't think sometimes they are consistent with the  
12 facts of this case.

13 MR. BRODSKY: Your Honor, most respectfully, on the  
14 last point, we put in an affidavit. Don't take my word for it  
15 or my representation, although it was made in good faith and  
16 has been made in good faith from the beginning, as an officer  
17 of the court.

18 And don't take Mr. Paes' word for what we can do at  
19 Gibson Dunn. Take the word under sworn penalty of perjury of  
20 Marc Schneider from Gibson, Dunn and Crutcher, who works as an  
21 eDiscovery specialist in the practice group, who wrote a sworn  
22 affidavit about exactly what we could or could not do in terms  
23 of the documents that we received. Nowhere does it say we  
24 can't de-dupe on a basic level. That was a red herring that  
25 Mr. Paes just threw up and I just want to answer it because

1 he's attacking our credibility, most respectfully. The  
2 affidavit -- sworn affidavit by Marc Schneider, which Mr. Paes  
3 is suggesting is not true.

4 THE COURT: No, he's not. He's just arguing that  
5 the bill of particulars motion and the information that it  
6 seeks is, in his view, attempting to limit and to impose  
7 burdens beyond what is required of the government. He's not  
8 impugning anyone's integrity. I didn't read it as a personal  
9 attack.

10 MR. BRODSKY: Thank you.

11 THE COURT: I think he is trying to make the point  
12 that there is software out there and that a firm like yours  
13 has access to the best available in the market for reviewing  
14 volumes of documents. There are -- it's a large firm with  
15 many lawyers who are capable of devoting time and effort to  
16 parsing through all the documents and preparing the case for  
17 trial. And I think he was trying to make a comparison -- and  
18 I don't think he meant any disrespect to you or to Mr. Gibson  
19 or to Mr. Brafman's firm, which is leaner and meaner, perhaps,  
20 in terms of --

21 MR. BRAFMAN: I'll take the meaner.

22 THE COURT: -- and has managed to get along fine  
23 with the government and there aren't as many issues. That's  
24 all he was saying. I'm not --

25 MR. BRODSKY: Understood, Your Honor.

1 THE COURT: -- going to hold any of that against  
2 anybody.

3 MR. BRODSKY: Understood. I did want to come to  
4 Mr. Schneider's defense when he said to Your Honor in his  
5 sworn affidavit that there were text-based searches that  
6 couldn't capture all the emails or that there were handwritten  
7 documents of poor quality that wouldn't be captured by  
8 text-based searches. I didn't want that to be missed.

9 So I appreciate Your Honor's comment, and I won't  
10 take Mr. Paes as attacking Marc Schneider's credibility.

11 I did want to return, though, to the notice  
12 requirement. Why is it significant to Evan Greebel as to  
13 whether or not the government is alleging in 2012, he knew  
14 Mr. Shkreli made false statements to the SEC? Well, in the  
15 indictment, they allege that there's certain conduct that  
16 occurred in 2012, and the purpose of that conduct, they allege  
17 by Mr. Shkreli, is for the purposes of backing up false  
18 statements allegedly made to the SEC.

19 Now, it is incredibly significant to us, Your Honor,  
20 that if they have no evidence and they are not alleging -- and  
21 they are not today, based on what they know today -- alleging  
22 that Mr. Greebel knew in 2012 that Mr. Shkreli was making  
23 these false statements, well, our defense changes.

24 If they were making that allegation, we would bring  
25 forth to a jury before Your Honor evidence to expressly

1 show -- we have to pull together the evidence. It would take  
2 time. It would take a few witnesses -- but we would  
3 definitely be able to affirmatively prove Mr. Greebel did not  
4 know Mr. Shkreli was allegedly making these false statements.

5 That is time and resources and energy and fair  
6 notice that we're entitled to have. That is an important  
7 point. It's not a side point that we're asking here. But a  
8 bill of particulars by definition -- by definition, of course  
9 by providing fair notice to the defense, limits the  
10 government. The government's position always happens to be  
11 they always oppose a bill of particulars except in some cases.  
12 They always say, we don't want to tell you all the  
13 transactions we're interested in. But it naturally limits the  
14 defense -- the government, but we want fair notice, Your  
15 Honor.

16 THE COURT: He's made it clear that the indictment,  
17 the superseding indictment defines the scope of the charges.  
18 He's given you additional information. He's correlated  
19 documents, numbers and subjects with various allegations in  
20 the superseding indictment, and I think that if you look at  
21 the sum total of what he's got, he's provided and tried to  
22 share with you -- you know, he's made disclosure that he  
23 argues is adequate for you to defend Mr. Greebel.

24 Now, he also said today if he receives documents  
25 indicating that Mr. Greebel knew certain issues in 2012, then

1 maybe the charges would reflect that. Maybe they would  
2 supersede. I don't know. That's what I heard him say.

3 MR. BRODSKY: Right, Your Honor.

4 THE COURT: So --

5 MR. BRODSKY: I understand that.

6 THE COURT: You're smart and savvy and you've also  
7 been a prosecutor and you know how indictments are framed and  
8 how the government provides discovery.

9 And I would say that in this case, it appears to me  
10 that the government has gone further than some prosecutors  
11 who I've seen in terms of providing information and trying to  
12 be forthright and transparent. Although the charges and what  
13 documents may assist you in defending your client, I haven't  
14 ruled on the motion, but it's certainly under advisement and  
15 you should expect a decision soon.

16 MR. BRODSKY: Thank you, Your Honor.

17 And Your Honor, we thank you for the last conference  
18 and with your help, we believe the government did narrow the  
19 transactions to some of the documents that they provided to  
20 us, which we appreciated and we totally understand.

21 THE COURT: All right. If the government can do  
22 more, do more. All right? I know that, you know, sometimes  
23 you are willing with some prompting or just on your own to  
24 provide more to the defense, and you should do that.

25 MR. PAES: Your Honor, we have. I'll just give you

1 one example, you know, where there are situations -- and this  
2 happened recently in not too -- what I meant, there was  
3 some -- getting a call, you know, there was some  
4 misunderstanding by Mr. Shkreli's counsel -- we believe some  
5 misunderstanding on some facts. And you know, we called them.  
6 We provided the information, you know, not totally advocate a  
7 position, but hey, according to what we believe, you may have  
8 this fact wrong. And we provided that information and told  
9 them that, because in the end -- look, we get they're headed  
10 for trial. We get, you know, zealous advocacy. I believe  
11 they're going to be headed there. Each side will represent  
12 their client as best as it can.

13 But I think if we don't argue and don't fight about  
14 the things that don't really matter, I think we'll all benefit  
15 from that, and I think we've tried to show that. We tried to,  
16 you know, provide information where we believe it was helpful  
17 and at the same time obviously not hurting our own interest as  
18 well, and what's required under the law.

19 THE COURT: From their perspective, they're a  
20 defendant and everything matters. So to the extent you can  
21 give them more without feeling that you are limiting your  
22 ability to prosecute this case, do it.

23 MR. PAES: And Your Honor, we have no issues with  
24 doing that and I think the fact that you pointed out the  
25 chart that we gave up and produced. We did a lot of work to

1 put that together.

2 THE COURT: Yes. That was helpful to me.

3 MR. PAES: And we did that and so, you know, while  
4 we thought it wasn't required, we nonetheless did that. And I  
5 think that's an example of how we, you know, acted in this  
6 case.

7 MR. BRODSKY: Yes, Your Honor. Thank you very much.  
8 Thank you for your time.

9 THE COURT: May I just ask one question of  
10 Mr. Shapiro? I have this September 2015 waiver letter. Are  
11 there other letters I should be aware of?

12 MR. SHAPIRO: That address the waiver?

13 THE COURT: Uh-hum (affirmative response).

14 MR. SHAPIRO: Not that I can recall, but I will go  
15 back and check.

16 THE COURT: I think you refer to one that was  
17 attached to Katten's letter. Was it in July, that waiver  
18 letter?

19 MR. VERDE: That's the same one.

20 THE COURT: Okay. Thank you.

21 MR. SHAPIRO: The letter that defines the scope of  
22 the waiver.

23 THE COURT: But then you said you also included  
24 other things in your waiver at the government's request and  
25 are there letters that reflect that?

1 MR. SHAPIRO: No. In July of 2015, we made a  
2 supplemental production in a separate civil case, because as a  
3 result of the waiver, there were documents that were withheld  
4 in that civil case as privileged, which we then realized that  
5 we had to produce in that civil case in the Southern District.

6 THE COURT: So by Monday, you will --

7 MR. SHAPIRO: The bills.

8 THE COURT: -- let Katten know whether they can  
9 provide the billing records to all interested parties, the two  
10 defendants and the government? And you will -- I mean, I can  
11 give you a deadline, but I want to be realistic, but you need  
12 to go over to Katten and review those documents and use  
13 whatever search terms you need to facilitate and expedite  
14 that, but I'm going to expect that within two weeks, we have  
15 something definite from you.

16 MR. SHAPIRO: Sure.

17 THE COURT: So by -- today is November 22nd, and in  
18 two weeks, that brings us to December 6th.

19 MR. SHAPIRO: That's fine, Your Honor.

20 THE COURT: So you will provide something in writing  
21 to Katten, the government, Mr. Greebel's attorney,  
22 Mr. Shkreli's attorney and file it with the Court. All right?

23 MR. SHAPIRO: That's fine.

24 THE COURT: All right. Thank you. I appreciate  
25 that. Everybody have a good Thanksgiving.



1 MR. BRAFMAN: Thank you, Your Honor.

2 (Proceedings concluded.)

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